Supreme Court, U.S.
FILED

961213 JAN 6 1997

No. _____

OFFICE OF THE CLERK

In The

Supreme Court of the United States

October Term, 1996

IN RE: LEONARD C. JAQUES,

Petitioner.

ON APPEAL FROM THE UNITED STATES COURT OF APPEALS
FOR THE FIFTH CIRCUIT

ON PETITION FOR WRIT OF CERTIORARI TO THE
UNITED STATES COURT OF APPEALS FOR THE FIFTH CIRCUIT

PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FIFTH CIRCUIT

AND APPENDIX

BENDURE & THOMAS
By: MARK R. BENDURE (P 23490)
Counsel of Record
577 East Larned, Suite 210
Detroit, Michigan 48226-4392
(313) 961-1525

Attorneys for Petitioner

BERG & ANDROPHY
By: JOEL M. ANDROPHY
3704 Travis Street
Houston, Texas 77002
(713) 529-5622

Attorneys for Petitioner

Interstate Brief & Record Company, *a division of* North American Graphics, Inc.
1629 West Lafayette Boulevard, Detroit, MI 48216 (313) 962-6230

QUESTIONS PRESENTED FOR REVIEW

I.

WHETHER LOCAL RULE 3 OF THE UNITED STATES DISTRICT COURT FOR THE EASTERN DISTRICT OF TEXAS PROVIDES TO ATTORNEYS ACCUSED OF MISCONDUCT THE DUE PROCESS GUARANTEED BY THE CONSTITUTION OF THE UNITED STATES.

A. WHETHER THE PROVISIONS OF THE LOCAL RULE WHICH REPOSE THE FACT-FINDING AND DECISION-MAKING AUTHORITY IN THE SAME JUDGE WHO HAS INITIALLY INVESTIGATED THE CHARGES, COMMENCED THE PROSECUTION, PREPARED THE CHARGES AGAINST THE ACCUSED, AND BEEN NAMED AS A WITNESS ON THE PROSECUTOR'S WITNESS LIST, THEREBY PLACING THE JUDGE IN THE POSITION OF ADJUDICATING THE CHARGES HE BROUGHT, AND ASSESSING HIS OWN TESTIMONY, SATISFY THE DUE PROCESS GUARANTEE OF A DISINTERESTED, IMPARTIAL DECISION-MAKER.

B. WHETHER THE PROVISIONS OF THE LOCAL RULE WHICH PLACE UPON THE ACCUSED ATTORNEY THE BURDEN OF "SHOW[ING] GOOD CAUSE WHY HE OR SHE SHOULD NOT BE SUSPENDED OR DISBARRED", SATISFY DUE PROCESS REQUIREMENTS.

C. WHETHER THE LOCAL RULE, WHICH REGARDS EARLIER FINDINGS OF CIVIL MISCONDUCT AS CONCLUSIVE, THUS AUTHORIZING DISCIPLINE IN THE ABSENCE OF TESTIMONIAL SUPPORT FOR THE CHARGES AND WITHOUT OPPORTUNITY FOR THE ACCUSED ATTORNEY TO CONTEST WHETHER THE CHARGED MISCONDUCT IN FACT OCCURRED, SATISFIES DUE PROCESS GUARANTEES.

PARTIES TO PROCEEDINGS

Petitioner LEONARD C. JAQUES is an attorney whose principal office is located in Michigan. He is a member of the State Bar of Michigan, as well as several federal bars. Mr. Jaques is admitted to practice before this United States Supreme Court, where he successfully argued *Vella* v. *Ford Motor Co*, 421 U.S. 1 (1975).

An attorney disbarment proceeding was commenced against Petitioner in the United States District Court for the Eastern District of Texas, Beaumont Division, under the ostensible authority of that Court's Local Rule 3. The Hon. Richard A. Schell initiated the charges by an Order to Show Cause. Pursuant to Local Rule 3, Judge Schell also serves as the decision maker at a hearing which began on November 12, 1996 and is scheduled to be resumed on January 24, 1997. This Petition seeks a Writ of Certiorari to the United States Court of Appeals for the Fifth Circuit.

TABLE OF CONTENTS

PAGE

QUESTIONS PRESENTED FOR REVIEW i

PARTIES TO PROCEEDINGS ii

TABLE OF AUTHORITIES v

OPINIONS BELOW 1

SUPREME COURT JURISDICTION 2

CONSTITUTIONAL PROVISION AND COURT RULES INVOLVED 3

CONCISE STATEMENT OF THE CASE 3

BASIS OF ORIGINAL FEDERAL JURISDICTION 8

COMPELLING REASONS WHY THE WRIT SHOULD BE ISSUED 8

ARGUMENT:

I. LOCAL RULE 3 OF THE UNITED STATES DISTRICT COURT FOR THE EASTERN DISTRICT OF TEXAS FAILS TO PROVIDE ATTORNEYS ACCUSED OF MISCONDUCT WITH THE DUE PROCESS GUARANTEED BY THE CONSTITUTION OF THE UNITED STATES. 11

A. By Reposing The Decision-Making And Fact-Finding Adjudicatory Role In The Same Person Who Has Conducted The Initial *Ex Parte* Investigation, Made The Original Decision To Seek Prosecution, And Issued The Charges, Thereby Placing The Judge In The Position Of Adjudicating The Charges He Has Brought, Local Rule 3 Does Not Satisfy The Due Process Guarantee Of A Disinterested Impartial Decision-Maker. 13

B. Local Rule 3, Which Places Upon The Accused Attorney The Burden Of "Show[ing] Good Cause Why He Or She Should Not Be

PAGE(S)

Suspended Or Disbarred" Does Not Satisfy Due Process Requirements. 17

C. Local Rule 3, Which Regards Earlier Findings Of Civil Misconduct As Conclusive, Thus Authorizing Discipline In The Absence Of Testimonial Support For The Charges And Without Opportunity For The Accused Attorney To Contest Whether The Charged Misconduct In Fact Occurred, Does Not Satisfy Due Process Guarantees. 18

II. A WRIT OF CERTIORARI SHOULD BE ISSUED. 21

RELIEF REQUESTED 24

APPENDIX:

ORDER DENYING RESPONDENTS' MOTION FOR RECUSAL – United States District Court, Eastern District of Texas, Beaumont Division (*August 30, 1996*) .. A-1 – A-9

ORDER DENYING WRIT OF MANDAMUS – United States Court of Appeals, Fifth Circuit (No. 96-40895) (*September 16, 1996*) A-10

ORDER DENYING WRIT OF MANDAMUS – United States Court of Appeals, Fifth Circuit (No. 96-41076) (*November 4, 1996*) A-11

ORDER TO SHOW CAUSE – United States District Court, Eastern District of Texas, Beaumont Division (*August 6, 1996*) ..... A-12 – A-14

AMENDED ORDER TO SHOW CAUSE – United States District Court, Eastern District of Texas, Beaumont Division ..... A-15 – A-22

AFFIDAVIT OF LEONARD C. JAQUES – United States District Court, Eastern District of Texas, Beaumont Division (*August 27, 1996*) ..... A-23 – A-26

PAGE(S)

HEARING TRANSCRIPT – United States District Court, Eastern District of Texas, Beaumont Division (*August 29, 1996*) A-27–A-36

HEARING TRANSCRIPT – United States District Court, Eastern District of Texas, Beaumont Division (*October 4, 1996*) A-37–A-40

EASTERN DISTRICT OF TEXAS LOCAL RULE 3 ..... A-41–A-44

LOUISIANA DISTRICT COURT RULE III A-45–A-52

LOUISIANA DISTRICT COURT RULE XX A-53–A-66

SUMMARY OF DISTRICT COURT RULES OF DISCIPLINARY PROCEEDINGS A-67–A-72

TESTIMONY OF GEOFFREY HAZARD (*November 12, 1996*) A-73–A-134

TABLE OF AUTHORITIES

CASES:

Bates v. *State Bar of Arizona*, 433 U.S. 350 (1977) 23

Bowman Transportation, Inc. v. *Arkansas Best Freight Systems, Inc.*, 419 U.S. 281 (1974) 19

Carroll v. *Jaques*, 927 F.Supp. 216 (E.D. Tex. 1996) ..... *passim*

Chambers v. *Mississippi*, 410 U.S. 284 (1973) 19

Charlton v. *FTC*, 543 F.2d 903 (D.C. Cir., 1976) 16

Cook v. *American Steamship Co.*, No. 91-CV-72412-DT (E.D. Mich. 19__) 5

Dairy Queen v. *Wood*, 396 U.S. 469 (1962) 22

Ex Parte Bradley, 74 U.S. 364 (1868) 22, 23

Ex Parte Robinson, 86 U.S. 505 (1873) 22, 23

Ferguson v. *Georgia*, 365 U.S. 570 (1961) 19

PAGE

Gibson v. *Berryhill*, 411 U.S. 564 (1973) 15

Goldberg v. *Kelly*, 397 U.S. 254 (1970) 15

In Re Mattox, 758 F.2d 1362 (10th Cir. 1985) 11, 19

In Re Medrano, 956 F.2d 101 (5th Cir. 1992) ..... *passim*

In Re Ming, 469 F.2d 1352 (7th Cir. 1972) ..... *passim*

In Re Murchinson, 349 U.S. 133 (1955) 15

In Re Ruffalo, 390 U.S. 544 (1968) 11, 13, 16, 18, 23

In Re Thalheim, 853 F.2d 383 (5th Cir. 1988) ..... *passim*

Jenkins v. *McKeithen*, 395 U.S. 411 (1969) 19

Konigsberg v. *State Bar of California*, 353 U.S. 252 (1957) 11, 23

Mack v. *Florida State Board of Dentistry*, 296 F.Supp. 1249 (S.D. Fla., 1969) 16-17

Mallard v. *U.S. District Court of Iowa*, 490 U.S. 296 (1989) 22

Morrisey v. *Brewer*, 408 U.S. 471 (1972) 15

Nipper v. *Snipes*, 7 F.3d 415 (4th Cir. 1993) 21

Ohralik v. *Ohio State Bar Association*, 436 U.S. 447 (1978) 23

Schware v. *Board of Bar Examiners*, 353 U.S. 232 (1959) 11, 23

Tumey v. *Ohio*, 273 U.S. 510 (1927) 15

United States v. *Jones*, 29 F.3d 1549 (11th Cir. 1994) ... 20, 21, 23

United States v. *Klubock*, 832 F.2d 664 (1st Cir. 1987) ... 21

Unites States v. *Nixon*, 418 U.S. 683 (1974) 19

Vella v. *Ford Motor Co.*, 421 U.S. 1 (1975) ii

Ward v. *Monroeville*, 469 U.S. 57 (1972) 15

PAGE

Washington v. *Texas*, 388 U.S. 14 (1967) 19

Watkins v. *United States*, 354 U.S. 1978 (1957) 19

Willner v. *Committee on Character & Fitness*, 373 U.S. 96 (1963) 11, 19, 23

STATUTES, COURT RULES AND OTHER AUTHORITIES:

FRE 201(b) 20

FRE 803(8)(c) 21

Local Court Rule 3 (Eastern District of Texas, Beaumont Division) ..... *passim*

Local Rule 3(b) 11

Local Court Rule 3(d)(2)(A) 9, 12, 14, 18

Local Court Rule 3(d)(2)(B) 12

Louisiana Local Rule III 9, 10, 13

Louisiana Rule XX.10E 14

Model Fed. R. Discip. Enforcement at V.D. (1995) 13

Supreme Court Rule 10.1(a) 23

United States Constitution 22

United States Constitution, Fifth Amendment 3

21 C. Wright & K. Graham, *Federal Practice and Procedure: Evidence* § 5104 at 485 (1977 F. Supp. 1994) 20

28 U.S.C. § 144 6

28 U.S.C. § 455 6

28 U.S.C. § 1254(1) 2

28 U.S.C. § 1651 2

96 YALE L.J. at 1065 17

No. _____

In The

Supreme Court of the United States

October Term, 1996

IN RE: LEONARD C. JAQUES,

Petitioner.

ON APPEAL FROM THE UNITED STATES COURT OF APPEALS
FOR THE FIFTH CIRCUIT

ON PETITION FOR WRIT OF CERTIORARI TO THE
UNITED STATES COURT OF APPEALS FOR THE FIFTH CIRCUIT

PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FIFTH CIRCUIT

OPINIONS BELOW

Hon. Richard A. Schell, United States District Court Judge for the Eastern District of Texas, Beaumont Division, initiated the disbarment proceedings, and issued the charging document, an Order to Show Cause (A-12–A-14), under the authority of that Court's Local Rule 3 (A-12–A-14, A-15). When it became apparent that Judge Schell would serve as the fact-finder and decision-maker, Petitioner filed a Motion for Recusal. Petitioner challenged the constitutionality of the Local Rule 3 procedure and also sought recusal under 28 U.S.C. §§ 144 and 455. By unpublished Opinion and Order of August 6, 1996 (A-1–A-9), the District Court denied Petitioner's Motion without explicitly addressing the constitutionality of Local Rule 3.

Petitioner filed a Petition for Mandamus in the Fifth Circuit Court of Appeals. By unpublished Order of September 16, 1996 (A-10), the Court of Appeals denied the Petition without comment. To assure that the Fifth Circuit Court of Appeals was squarely presented with a challenge to the constitutionality of Local Rule 3, Petitioner filed a second Petition for Mandamus, addressing that question only. On November 4, 1996, the Fifth Circuit denied that Petition as well (A-11). Petitioner now seeks relief from this Court.

SUPREME COURT JURISDICTION

The Order of the District Court denying Petitioner's recusal motion was entered on August 6, 1996. The initial Petition for Writ of Mandamus was filed with the United States Court of Appeals for the Fifth Circuit on September 10, 1996, and was denied by Order of September 16, 1996. A second Petition for Writ of Mandamus was filed with the Fifth Circuit Court of Appeals on October 31, 1996, and was denied by Order of November 4, 1996. Petitioner invokes the certiorari jurisdiction conferred on this Court by 28 U.S.C. § 1254(1), which provides:

> "Cases in the courts of appeals may be reviewed by the Supreme Court by the following methods:
>
> (1) By writ of certiorari granted upon the petition of any party to any civil or criminal case, before or after rendition of judgment or degree."

The authority of the Court to issue a Writ of Mandamus is conferred by 28 U.S.C. § 1651, the All Writs Act, which provides:

> "The Supreme Court and all courts established by Act of Congress may issue all writs necessary

or appropriate in aid of their respective jurisdiction and agreeable to the usages and principles of law."

CONSTITUTIONAL PROVISION AND COURT RULES INVOLVED

Petitioner relies upon the protection of the due process clause of the Fifth Amendment to the Constitution of the United States, which provides:

> "*No person shall be* held to answer for a capital, or otherwise infamous crime, unless on a presentment or indictment of a Grand Jury, except in cases arising in the land or naval forces, or in the Militia, when in actual service in time of War or public danger; nor shall any person be subject for the same offense to be twice put in jeopardy of life or limb; nor shall be compelled in any criminal case to be a witness against himself, nor be *deprived of* life, *liberty, or property, without due process of law*; nor shall private property be taken for public use; without just compensation" (emphasis supplied).

The procedure by which attorney disbarments are conducted in the Eastern District of Texas is that of Local Rule 3. That Rule is reproduced in full in the Appendix (A-41–A-44).

CONCISE STATEMENT OF THE CASE

This Petition arises out of an attorney discipline proceeding against Leonard C. Jaques[1], initiated *sua sponte* by the Honorable Richard A. Schell, United States Dis-

---

[1] **The initial Order to Show Cause (A-12–A-14) was also directed against the Jaques Admiralty Law Firm, P.C. An Amended Order to Show Cause (A-15–A-22) dismisses the action against the law firm.**

trict Court Judge for the Eastern District of Texas, Beaumont Division.[2] The proceeding was initiated pursuant to that Court's Local Rule 3 (A-41–A-44). This Petition calls upon the Court to determine whether Local Rule 3 measures up to constitutional due process standards.

Judge Schell was the trial judge in *Carroll* v. *Jaques*, a civil action brought against Mr. Jaques and his law firm by a disgruntled former client. A verdict was returned for the plaintiff in *Carroll*, and the trial judge upheld the verdict [*Carroll* v. *Jaques*, 927 F.Supp. 216 (E.D. Tex. 1996)]. The judgment in *Carroll* has been appealed to the Fifth Circuit Court of Appeals, where it remains pending (Docket No. 96-40562). Mr. Jaques did not testify before the trial court, but his videotape deposition was presented to the jury by his adversary.

Following the verdict, the trial judge *sua sponte* initiated proceedings to sanction Mr. Jaques for his language, as defendant/witness, at his deposition. The trial court sanctioned Mr. Jaques $7,000, based on the words used [*Carroll* v. *Jaques*, 926 F.Supp. 1282 (E.D. Tex. 1996)][3]. That ruling is also on appeal to the Court of Appeals (Docket No. 96-40667).

Without waiting for appellate review of these decisions, the trial court commenced the disciplinary proceedings which give rise to this Petition. He conducted an effort to dredge up records in other cases that might assist in the prosecution of current disbarment proceedings [*See* Order Denying Respondents' Motion for Recusal p. 4, fn. 2, A-5–A-6)]. The trial judge also had *ex parte* contact with Thomas Emery, a Michigan attorney,

---

2 A central aspect of this Petition is that Local Rule 3 reposes multiple roles in the same person, Judge Schell in this case. For clarity, the term "trial court" or "trial judge" is used to refer to Judge Schell, the individual, in his various capacities. The term "district court" refers to the bench as a whole.

3 The sanction of Respondent in *Carroll* occurred without an evidentiary hearing.

and furnished a document to be used by Mr. Emery in an unsuccessful attempt to have Mr. Jaques disqualified as counsel for the plaintiff in *Cook* v. *American Steamship Co.*,[4] a case pending in the District Court for the Eastern District of Michigan (No. 91-CV-72412-DT).

The trial court apparently[5] then discussed Mr. Jaques with his colleagues on the Eastern District bench. Having secured approval of his colleagues to proceed, the trial judge issued an Order to Show Cause (A-12-A-14).

The trial judge also selected the special prosecutor who is now opposing counsel to Mr. Jaques (A-14). The trial court admits to *ex parte* dealings with the special prosecutor in which the court "assisted the special prosecutor in the preparation of the charges" (A-7).

An Amended Order to Show Cause (A-15-A-22), was prepared by the special prosecutor for signature by the District Court. At a telephone conference, the trial court directed the prosecutor regarding the language used in framing the charges which the trial court will eventually try [Transcript of 10/4/96, pp. 2-5 (A-37-A-40)]. The original Order to Show Cause (A-12-A-14) and the amended version (A-15-A-22) rely on Local Rule 3 as the predicate for discipline.

---

4 *Cook* is a case in which Mr. Jaques and Mr. Emery represent adverse parties. After the judge and jury vacated the courtroom at the end of the first day of trial, Mr. Jaques separated an irate Mr. Emery from a fragile witness that Emery was threatening orally and physically. Emery attempted to have Mr. Jaques disqualified from representing the adversary of Mr. Emery's client, and Judge Schell provided his assistance. When the motion was unsuccessful, the *Cook* case was tried to a verdict obtained by Mr. Jaques for his client in the amount of $1,500,000.

5 The word "apparently" is used, because no evidentiary hearing was held on the recusal motion. The facts cited are those of record and those which may be readily inferred from the trial court's writings and comments.

The Order to Show Cause (A-12–A-14) lists six cases involving Mr. Jaques. The two charges arising in the Eastern District of Texas are both based on the trial court's own earlier rulings, now on appeal, in the *Carroll* case. The remaining four arose outside the District Court's jurisdiction and go back as much as thirteen years. All the charges involve disputed evidentiary facts [see Affidavit of Leonard Jaques (A-23–A-26)].

On August 29, 1996, the trial court identified the hearing he proposed to hold [Transcript of 8/29/96 (A-27–A-36)], which was scheduled for November 12, 1996. The trial judge will not require the prosecutor to independently prove misconduct by Respondent; he will rely on prior characterizations of that conduct, including his own earlier findings in the *Carroll* case. No witnesses were to be called, and the trial court would not independently determine whether Respondent is in fact guilty of misconduct (A-28–30, A-32).

After that hearing, Petitioner filed a Motion for Recusal. That Motion relied upon the statutory recusal standards of 28 U.S.C. §§ 144 and 455, as well as the due process guarantees of the Fifth Amendment. On August 30, 1996, before the prosecutor could respond to the recusal motion, the district court issued an Opinion and Order denying the recusal motion (A-1–A-9). That Opinion and Order did not explicitly address the constitutional questions presented.

On September 10, 1996, Petitioner filed a Petition for Writ of Mandamus in the Court of Appeals for the Fifth Circuit, again presenting both constitutional and statutory recusal arguments. The Fifth Circuit issued an Order denying the Petition on September 16, 1996, which did not address the merits of Petitioner's substantive arguments (A-10).

In order to provide the Court of Appeals with an opportunity to squarely consider the constitutional challenges to Local Rule 3, Petitioner filed a Petition for

Mandamus in the Fifth Circuit Court of Appeals on October 31, 1996. That Petition was denied on November 4, 1996 (A-11).

Two days later, the special prosecutor filed his Witness List. That Witness List identified Judge Schell as a prosecution witness to be presented at the hearing before that same judge. By then, trial was scheduled for November 12th, eight days later.

Petitioner filed a typewritten Petition for Mandamus[6] and an Emergency Motion for Stay of Proceedings with this Court. The stay motion was denied by Circuit Justice Scalia on November 12, 1996.

With Petitioner's timely summary judgment and dismissal motions unresolved, the hearing began as scheduled. Over Petitioner's objection, the court admitted prior writings as substantive evidence, without the authors (including Judge Schell himself) presented for in-court testimony or cross-examination. The special prosecutor also presented Petitioner as a witness.

In defense, Petitioner presented the testimony of Professor Hazard, a renowned expert on questions of attorney ethics and discipline. The testimony of Professor Hazard is found in the Appendix (A-73–A-134). Following Professor Hazard's testimony, the hearing was adjourned without date (A-134). Since that time, the hearing has been scheduled to be resumed on January 24, 1997.

As a result, Petitioner faces a disbarment hearing predicated on Local Rule 3. That hearing is held before the same trial judge who initiated the charges, filed the charging document, and is identified as a prosecution witness on the special prosecutor's Witness List.

---

6 The typewritten version, which was returned by the Court, has been modified slightly to note the most recent developments. On about December 5, 1996, Petitioner filed a Petition for Writ of Mandamus or Certiorari, which was returned because alternative relief was sought. Petitioner learned of this on December 18, 1996, when the returned Petitions were received.

BASIS OF ORIGINAL FEDERAL JURISDICTION

This case began as an original action in the United States Court of Appeals for the Eastern District of Texas, Beaumont Division, commenced by a Judge of that Court under the ostensible authority of that Court's Local Rule 3. The Order to Show Cause does not, on its face, cite any federal statute thought to confer jurisdiction on the Court. Petitioner presumes that the action was an attempt to exercise the assumed jurisdiction of a federal district court to discipline attorneys admitted to practice before that court.

COMPELLING REASONS WHY THE WRIT SHOULD BE ISSUED

The Petition presents substantial and meritorious questions regarding the constitutionality of Local Rule 3 and the procedures for attorney discipline in the Eastern District of Texas under that Rule. The salient features of Local Rule 3, as construed and applied by the Eastern District of Texas, are that it permits or requires the following procedures in attorney disbarment proceedings brought under the Rule:

- The Judge who initially investigated the matters in issue *ex parte*, then obtained leave of his colleagues to initiate the prosecution, then issued the charging document (the Order to Show Cause), then appointed the special prosecutor, then conferred with the prosecutor *ex parte*, then directed the prosecutor in drafting the Amended Order to Show Cause, and was then named as a prosecution witness to be presented at the hearing, is assigned the decision-making role of trial judge, called upon to determine whether the charges which he has initiated have been proven.
- Formal proceedings are initiated by an Order to Show Cause which places on the accused attorney

the burden "to show good cause why he or she should not be suspended or disbarred", Local Rule 3(d)(2)(A).

- At the ultimate hearing, discipline may be imposed on the basis of earlier written findings of civil misconduct, without any testimonial proof of actual misconduct, and with the accused attorney unable to litigate the merits of the earlier findings.

The substantial shortcomings of Local Rule 3 are evident from a comparison with the due process model exemplified by the procedures of the Eastern, Middle and Western Districts of Louisiana (A-45–A-66), which the Court cited with approval in *In Re Medrano*, 956 F.2d 101, 102, fn. 2 (5th Cir. 1992).

DUE PROCESS MODEL

LOUISIANA LOCAL RULE	*EASTERN DISTRICT OF TEXAS LOCAL RULE 3*
Commencement:	
By filing a complaint [Rule III (A)(1)], which is referred to the court as a whole [Rule III (A)(3)], and may be referred for processing to the local bar association [Rule III (A)(4)].	District Judge initiates proceedings, without written complaint, by approval of the bench [Local Rule 3(d)(2)(A)].
Decision-Maker:	
The proceeding is randomly assigned, but may not be heard by a judge who initiated the process [Rule III (A)(5)].	The decision-maker is the same judge who initiated the charges.
Prosecutor:	
Appointed by the trial judge [Rule III (B)(1)], who cannot be the judge who initiated charges	Selected by the judge who initiated the proceedings and will hear the case, without apparent

DUE PROCESS MODEL

LOUISIANA LOCAL RULE	*EASTERN DISTRICT OF TEXAS LOCAL RULE 3*
[Rule III(A)(5)], with protection against appointment of a prosecutor who is adverse to the attorney in another case [Rule 111(B)(4)], and authority in the prosecutor to recommend against continued prosecution [Rule III(B)(6)].	authority in the prosecutor to dismiss.
Contact:	
The prosecutor receives written direction of the scope of the allegations [Rule III(B)(1), (2)], and presumably proceeds without further contact with decision-maker.	The judge who initiated the charges and will decide the case meets with the prosecutor *ex parte* and continues to direct the framing of the charges.
The Hearing:	
Where the accused disputes the factual basis of charges, an independent evidentiary hearing is conducted [Rule III(C)(3)], and subpoenas may be issued [Rule III(B)(5)]. Even an earlier criminal conviction is subject to challenge [Rule III(G)(4)].	Earlier civil findings are deemed to conclusively establish charges without opportunity to litigate the facts which are disputed.
The Decision:	
The ultimate decision-maker is the bench as a whole [Rule 3(d)(1)].	The judge who initiated the charges makes the final decision.

As will be shown (section I), Local Rule 3 fails to provide accused attorneys of the Fifth Amendment due process guarantees which are their birthright. The questions presented warrant the exercise of this Court's authority to issue a Writ of Certiorari (section II).

ARGUMENT

I.

LOCAL RULE 3 OF THE UNITED STATES DISTRICT COURT FOR THE EASTERN DISTRICT OF TEXAS FAILS TO PROVIDE ATTORNEYS ACCUSED OF MISCONDUCT WITH THE DUE PROCESS GUARANTEED BY THE CONSTITUTION OF THE UNITED STATES.

Bar discipline actions seek to deprive an attorney of the benefits of his license to practice law, the means to earn a livelihood for himself and his family, and the fruits of long dedication to professional education and building a practice. These are "property" or "liberty" interests within the meaning of the due process guarantees of the Fifth and Fourteenth Amendments. Actions to prevent an attorney from practicing law are therefore subject to due process constraints. *Schware* v. *Board of Bar Examiners*, 353 U.S. 232, 238 (1959); *Konigsberg* v. *State Bar of California*, 353 U.S. 252, 262 (1957); *In Re Ruffalo*, 390 U.S. 544, 547 (1968); *Willner* v. *Committee on Character & Fitness*, 373 U.S. 96, 102 (1963); *In re Medrano*, 956 F.2d 101, 102 (5th Cir. 1992); *In re Mattox*, 758 F.2d 1362, 1365 (10th Cir. 1985); *In re Ming*, 469 F.2d 1352, 1355 (7th Cir. 1972).

Traditionally, membership in the bar of a federal court derives from membership in the bar of one or more States. *Ruffalo*, 390 U.S. at 547. Similarly, discipline by a state bar typically results in discipline by the federal courts. For example, under Local Rule 3(b), discipline by a State generates automatic suspension or

disbarment from practice in the Eastern District of Texas. Under that ordinary practice, Mr. Jaques would not be subject to discipline in the Eastern District of Texas, as he remains a member in good standing of the State Bars of which he is a member[7].

As an overview, Local Rule 3(d)(2)(a) empowers a district court judge to bring to the full bench of the district a suggestion that disciplinary proceedings be commenced. In practice, as here, this entails an initial *ex parte* investigation by that Judge and preliminary discussions between the Judges. When a decision is made to proceed, the complaining judge issues the charges (A-12–A-14), handpicks the prosecutor, Local Rule 3(d)(2)(B) (A-11), and confers *ex parte* with the prosecutor about the charges (A-8).

The charges take the form of an Order to Show Cause, allowing (or requiring) the accused "to show good cause why he or she should not be suspended or disbarred", Local Rule 3(d)(2) (A); *see* A-12. The person who adjudicates the charges is the same Judge who investigated and initiated the charges in the first instance, who issued the Order to Show Cause, and who is identified as a witness who the prosecutor may call at the hearing.

Local Rule 3(d)(2) does allow a "hearing". However, where an earlier writing finds misconduct, the Local Rule 3 procedure entails no testimony or cross-examination of the author of the earlier writing (A-28–A-29). In essence, the purpose of the hearing is to enable the attorney to argue in mitigation of the degree of discipline.

---

7 Two of the incidents cited in the Order to Show Cause — the affray with Mr. Emery in the *Cook* case and the presence of an associate in place of Mr. Jaques at the *Ahmed* trial — are the subject of pending Michigan bar proceedings. The standard procedure would be to await the outcome of the State proceedings rather than jump the gun with a separate District Court action.

After *Ruffalo*, most courts reformed their disciplinary rules to comport with due-process guarantees, including the right of accused attorneys to have their cases decided by decision-makers different than those who pressed the charges in the first instance. The question squarely posed is whether the Local Rule 3 practice, which lacks the procedural safeguards of modern counterparts, passes constitutional muster.

A. By Reposing The Decision-Making And Fact-Finding Adjudicatory Role In The Same Person Who Has Conducted The Initial *Ex Parte* Investigation, Made The Original Decision To Seek Prosecution, And Issued The Charges, Thereby Placing The Judge In The Position Of Adjudicating The Charges He Has Brought. Local Rule 3 Does Not Satisfy The Due Process Guarantee Of A Disinterested Impartial Decision-Maker.

In other Districts, where discipline is handled only by judges, due process guarantees are in place to assure that the case is heard by a judge other than one who has framed the disciplinary allegations. *See* Chart of Nationwide Local Rules (A-67–A-72); Louisiana Rule III (A-45–A-52). The Model Federal Rules of Disciplinary Enforcement, for example, provide that "if the disciplinary proceeding is predicated upon the complaint of a Judge of this Court the hearing shall be conducted before a panel of three Judges of this Court appointed by the Chief Judge . . ." MODEL FED. R. DISCIP. ENFORCEMENT at V.D. (1995).

In *In re Medrano*, 956 F.2d 101 (5th Cir. 1992), the Court of Appeals for the Fifth Circuit suggested that the Local Rules for the Eastern, Middle, and Western Districts of Louisiana are an appropriate due-process model[8]. Those rules do not allow the judge who com-

---

8 The Court in *Medrano* noted that the accused attorney in that case "has not challenged the validity of the local rules," *Medrano*,

(*concluded on page 14*)

plains of alleged lawyer misconduct to conduct the resulting disciplinary proceedings. *See* A-45 ("If a matter is predicated upon a complaint by an allotted judge, it should be reallotted.").

Eastern District Local Rule 3, the Rule involved in this case, stands in stark contrast to its modern counterparts. It has not been updated since *Medrano*. Under Local Rule 3(d)(2)(A), the judge who initiates the inquiry, upon receiving approval of the other judges to proceed, issues the charges, then decides the charges he has issued. As construed and applied in this case, Local Rule 3 allows the judge who will decide the case to engage in an *ex parte* "investigation", issue the charges in his own name, hand-pick and direct the prosecutor, and instruct the prosecutor in formulating the charges the court will decide. In reposing the fact-finding, decision-making authority in the same person who has initiated the prosecution and directed the prosecutor, Local Rule 3 crosses the constitutional line.

The core due process principle that requires a disinterested fact-finder is beyond dispute. And, it is settled that due process is denied when one is required to face the judgment of an adjudicator who has potentially con-

---

(*continued from page 13*)

956 F.2d at 103. The Court nonetheless noted the serious questions raised by the local procedure involved in that case, 956 F.2d at 102, fn. 2:

> **"We maintain significant reservations about the procedures followed, including the manner in which evidence was submitted. The district court should conduct such hearings in the traditional adversarial mode. It is preferable that the court formally adopts a disciplinary Rule."**

***See, e.g.* Uniform Local Rules of the United States District Courts for the Eastern, Middle, and Western District of Louisiana, Rule XX.10E.**

This case presents the challenge to the local rules absent from *Medrano*. It permits the Court to decide directly the propriety of disciplinary procedures about which the Fifth Circuit maintained "serious reservations" in *Medrano*.

flicting interests. *Tumey* v. *Ohio*, 273 U.S. 510 (1927) (judge compensated out of fines collected in cases decided by the judge); *Ward* v. *Monroeville*, 469 U.S. 57 (1972) (adjudicators responsible for city finances funded, in part, by fines in cases adjudicated); *Gibson* v. *Berryhill*, 411 U.S. 564 (1973) (adjudicators who were business competitors of accuseds' employers). Similarly, due process guarantees are offended when the decision-maker is one who has previously participated in the controversy in a role which is incompatible with detached neutrality. *In re Murchison*, 349 U.S. 133 (1955) (judge who sat as one-man grand juror, and charged a witness with contempt, could not permissibly adjudicate the charge); *Goldberg* v. *Kelly*, 397 U.S. 254, 271 (1970) (decision-maker at evidentiary hearing regarding termination of welfare benefits may not be one who "participated in making the decision under review"); *Morrisey* v. *Brewer*, 408 U.S. 471, 485 (1972) (in parole revocation proceedings, "due process requires that [the decision-maker be] someone not directly involved in the case"); *see also Gibson*, 441 U.S. at 579, fn. 17:

> "The extent to which an administrative agency may investigate and act upon the material facts of a case and then, consistent with due process, sit as an adjudicative body to determine those facts finally has occasioned some divergence of views among federal courts. Compare *Amos Treat & Co.* v *SEC*, 113 US App DC 100, 306 F2d 26 (1962), and Trans *World Airlines* v *CAB*, 102 US App DC 391, 254 F2d 90 (1958), with *Pangburn* v *CAB*, 311 F2d 349 (CA1 1962). See also *Mack* v *Florida State Board of Dentistry*, 269 F Supp 1259 (SD Fla 1969)."

Whether the investigation of alleged misconduct is undertaken by an attorney panel, a disciplinary committee, or a special prosecutor, due process requires that the functions of that inquisitory body be separated from the adjudicative function. The Fifth Circuit Court

of Appeals has recognized as much in discussing the strictness with which local disciplinary rules are to be applied. *In re Thalheim*, 853 F.2d 383, 386 (5th Cir. 1988). In *Thalheim*, the Court reversed a judgment of suspension, because the Eastern District of Louisiana failed to follow its own rules requiring that an independent attorney panel must recommend disciplinary proceedings before the court could institute them. In response to the appellant's contention "that the court violated procedural due process by failing to follow its own requirements concerning proper disciplinary procedure when it instituted proceedings with respect to the alleged federal infractions despite the attorney panel's recommendation," the Court concluded: "We must agree." *Id.*

The *Thalheim* decision does not address the question of what due process requires, in the absence of a local rule requiring an independent inquisitorial finding to support a disciplinary proceeding. The existence of a local rule made that inquiry unnecessary in *Thalheim*. Here, however, the Local Rules of the Eastern District of Texas lack the fundamental safeguards available to the attorney in *Thalheim*. Petitioner submits that Local Rule 3 authorizes the combination of inquisitorial and judicial function that the *Thalheim* decision forbids. *Medrano, Ruffalo,* and *Charlton* v. *FTC*, 543 F.2d 903 (D.C. Cir., 1976), along with the local rules of other federal courts, all recognize that procedural due process requires the separation of these functions.

On point is the District Court's observation in *Mack* v. *Florida State Board of Dentistry*, 296 F. Supp. 1249, 1262-1263 (S.D. Fla., 1969), *aff'd in part and rev'd in part on other grounds*, 430 F.2d 862 (1970) (denial of due process where adjudicator of fact in dental license revocation proceeding was involved in investigating facts and filing complaint):

> "Translating the proceedings into criminal procedural terms, we have here a dentist of twenty years practice, who has permanently lost the

> privilege to practice his profession, as the result of pre-trial proceedings and final hearing where the petit jury was made up of the same members as the grand jury; where the prosecuting attorney acted in some respects as the judge; where the foreman of the grand jury and the chief investigator for the state . . . sat with the jury; and finally, when the jury retired to deliberate, they did so in the presence of the prosecuting attorney and the so-called chief investigator . . . Were this a criminal trial being discussed, it could only be characterized as foreign to our notions of fairness and justice and somewhat reminiscent of the Star Chamber proceedings which have hopefully been relegated to history."

In sum, the Eastern District of Texas Local Rule 3 fails to accord to accused attorneys the due process guarantee of a disinterested and impartial decision-maker. In combining the investigatory, prosecutorial and decision-making functions, Local Rule 3 is constitutionally infirm. This Court should issue a writ of certiorari to review the constitutionality of Local Rule 3, as well as these proceedings, which are based on that Rule.

B. Local Rule 3, Which Places Upon The Accused Attorney The Burden Of "Show[Ing] Good Cause Why He Or She Should Not Be Suspended Or Disbarred", Does Not Satisfy Due Process Requirements.

As Professor Hazard explains, "By the middle of the 1960's, if not before, summary procedure, in which the accused lawyer was ordered to 'show cause' why he should not be disbarred, was obsolete." 96 YALE L.J. at 1065. Local Rule 3 perpetuates that "obsolete" practice. Under that Rule, when the decision to charge is made, the allegations are set out in a court order (A-12–A-14), which requires the accused "to show cause why he or

she should not be suspended or disbarred", Local Rule 3(d)(2)(A).

The "hearing" provided for by Local Rule 3(d) does not require the accuser to prove the truthfulness of the charges (*see* sub-section C, *infra*). As it shifts to the attorney the burden of disproving the charges, Local Rule 3 is constitutionally infirm on this ground as well. Because disciplinary proceedings are adversarial proceedings, the prosecution bears the burden of proving all elements of a violation. *In re Ruffalo, supra; In re Thalheim, supra.*

C. Local Rule 3, Which Regards Earlier Findings Of Civil Misconduct As Conclusive, Thus Authorizing Discipline In The Absence Of Testimonial Support For The Charges And Without Opportunity For The Accused Attorney To Contest Whether The Charged Misconduct In Fact Occurred, Does Not Satisfy Due Process Guarantees.

The trial judge has construed the "hearing" requirement of Local Rule 3 as not requiring testimonial proof in support of the charges. Under that procedure, earlier findings of civil misconduct are accepted at face value, and it appears that the accused is not allowed to show that his *actual* conduct was not improper[9] (see A-28–A-29).

The Local Rule 3 procedure requires only the presentation of prior writings, without an opportunity for cross-examination of the author or testimonial proof of

---

9 As Mr. Jaques has explained in his Affidavit (A-23–A-26), there are disputed questions of fact regarding the charges. For example, in the Cook case, his conduct is characterized as an assault, while he submits that the acts in question were justifiable defense of an expert witness threatened by opposing counsel. In the *Ahmed* case, Mr. Jaques is accused of making a misrepresentation to Judge Aldrich, despite the fact that the Sixth Circuit found only a failure to appear for a proceeding at which the accused's associate appeared in his stead. The point of these observations is to underscore the factual issues presented by the accusations which Local Rule 3 does not require or permit to be litigated.

actual misconduct. The Rule is deficient in this respect as well. Due process affords to those charged with misconduct the opportunity to confront and cross-examine those who make written accusations against them. *Willner, supra*, 373 U.S. at 103-104; *In re Ming*, 469 F.2d 1352, 1356 (7th Cir. 1972); *In re Mattox*, 758 F.2d 1362, 1366-1367 (10th Cir. 1983)[10].

The net impact of the Local Rule 3 "hearing" is to allow reliance on prior writings in a fashion that disables the accused attorney from showing that the facts are different from what the writing reflects. Such rules, which operate to deprive a litigant of the means necessary to sustain his defense, are violative of due process guarantees. *Ferguson* v. *Georgia*, 365 U.S. 570 (1961); *Chambers* v. *Mississippi*, 410 U.S. 284 (1973). See also *United States* v. *Nixon*, 418 U.S. 683 (1974) and the plurality opinion of Justice Marshall in *Jenkins* v. *McKeithen*, 395 U.S. 411 (1969). As stated in *Bowman Transportation, Inc.* v. *Arkansas Best Freight System, Inc.*, 419 U.S. 281, 288, fn.4 (1974), "The Due Process Clause forbids an agency to use evidence in a way that forecloses an opportunity to offer a contrary presentation."

Many of the prior writings involve findings of civil misconduct which are currently on direct appeal, and therefore have not attained finality for disciplinary purposes, *Ming*, 469 F.2d at 1354. *None* of the prior findings involves a criminal conviction.

---

10 It would also seem fundamental that due process includes compulsory process to secure for Mr. Jaques the attendance of witnesses, *Washington* v. *Texas*, 388 U.S. 14 (1967), and the opportunity to inquire of the investigators, *Watkins* v. *United States*, 354 U.S. 1978 (1957). If this is so, Local Rule 3, by combining the investigative and decision-making functions, results in the prospect of a trial judge, as fact-finder, assessing his own testimony, as investigator, another conflicting role with grave constitutional implications (*see* section A, *infra*).

Even where the earlier finding is of a criminal nature[11], unlike here, the *finding* may not be used as the basis for discipline while the earlier case is on appeal; it is the *conduct* which is determinative. As the *Ming* Court explained (469 F.2d at 1354):

> "If the Executive Committee is of the opinion that the nature of the conduct requires consideration of suspension before finality, it can always proceed under the portion of General Rule 8 allowing disbarment or suspension for 'acts of professional misconduct prejudicial to the orderly administration of justice,' the section following the misdemeanor section. *Proceeding under that section would clearly require an evidentiary hearing to establish that the attorney had in fact committed the acts of which he was charged, rather than relying on the judgment of the criminal court*, but such a path is necessary in these situations" (emphasis supplied).

The Local Rule 3 procedure, which regards earlier writings as conclusive, denies accused attorneys the opportunity to have their fate decided in accord with the Federal Rules of Evidence. Where the "facts" found in the earlier writing are disputed, they are not the subject of judicial notice under FRE 201(b). *United States* v. *Jones*, 29 F.3d 1549, 1553 (11th Cir. 1994); 21 C. Wright & K. Graham, *Federal Practice and Procedure: Evidence*

---

[11] The distinction between earlier civil findings and earlier criminal findings is crucial. Most disciplinary codes call for automatic discipline for a felony conviction. In that setting, there is arguable justification for suspension on the ground that — irrespective of actual guilt or innocence — it disserves the reputation of the courts to allow a convicted felon to practice before them (*see Ming, supra*). No such justification for discipline arises in the civil context, and most disciplinary schemes, including that of the Eastern District of Texas, treat *a prior finding* as grounds for discipline only where the finding is of a criminal, rather than civil, nature. For civil findings, it is the *conduct* which is the basis for discipline, not the prior *finding*, even after the earlier finding attains finality.

§ 5104 at 485 (1977), 1994 Supp. Nor are the prior writings even admissible in evidence, as they are classic hearsay which is not admissible under FRE 803(8)(c), since earlier judicial findings in another case do not fall within that hearsay exception. *United States* v. *Jones, supra*, 29 F.3d at 1554; *Nipper* v. *Snipes*, 7 F.3d 415, 418 (4th Cir. 1993).

Local Rule 3, as construed and applied by the District Court, circumvents the *meaningful* hearing required by *Ming, Jones*, and constitutional due process guarantees. By authorizing discipline without testimonial proof of actual misconduct, without cross-examination or confrontation of the authors of prior writings relied upon, without regard to the Federal Rules of Evidence, and without the opportunity to show that the accused did not in fact commit the charged misconduct, the Rule fails to pass constitutional muster.

II.

A WRIT OF CERTIORARI SHOULD BE ISSUED.

Petitioner recognizes that a petition for a writ of certiorari is addressed to the Court's discretion in the exercise of its constitutional and statutory obligations and authority. The issues presented by this case satisfy the established criteria for issuance of the writ in several respects. The Court's discretion should be exercised to review the substantial questions presented.

The authority of district courts to adopt local rules is not unlimited. "Local court rules [regarding attorney discipline] are subject to review under an appellate court's supervisory powers," *In re Medrano*, 956 F.2d 101, 103 (5th Cir. 1992). Review of a local court rule necessarily includes determining whether the rule comports with the enabling body of law, that is, "whether the rule is constitutionally infirm", *United States* v. *Klubock*, 832 F.2d 664, 667 (1st Cir. 1987). The Petition in this case

invokes the Court's important role in supervising the lower courts and the limitations on their rule-making powers.

More significantly, the local rule in issue empowers a district court to take from an attorney the ability to practice his profession. And, by extension, the local rule permits the court to deny clients who have retained Petitioner to represent them the attorney of their choice. The Supreme Court review (albeit by mandamus after the fact of disbarment) has been deemed appropriate by this Supreme Court in two cases involving attorney disbarment: *Ex Parte Bradley*, 74 U.S. 364, 376-377 (1868) (writ of mandamus issued to reinstate an attorney improperly disbarred by the lower court); *Ex Parte Robinson*, 86 U.S. 505, 525 (1873) (same). *See also Mallard* v. *U.S. District Court of Iowa*, 490 U.S. 296, 309-310 (1989) (Court of Appeals erred in denying mandamus relief to an attorney whose motion to withdraw was denied by the district court).

The protections invoked by Petitioner are those of the Constitution of the United States, the supreme law of the land, over which this Court is the supreme guardian. It is appropriate for this Court to direct a lower court judge to perform the duty required by law, such as the obligation to vindicate rights guaranteed by the Constitution. *Dairy Queen* v. *Wood*, 369 U.S. 469, 479-480 (1962) (circuit court erred in denying petition for mandamus to require district court to honor demand for jury trial).

In modern America, lawyer-bashing has become a commonplace pastime. The temptation to discipline attorneys — for a variety of reasons, including unconventional independence — is undeniable. The need to assure procedures that permit an informed decision, without trampling on fundamental constitutional liberties, is evident. This is a propitious time, and a propitious case, to address a question which cries out for Supreme Court review.

This Court has not hesitated to review cases which present a clash between governmental regulation of attorneys and constitutional rights. Cases such as *Schware, Konigsberg, Ruffalo, Willner, Bradley* and *Robinson* highlight this point, as do *Ohralik* v. *Ohio State Bar Association,* 436 U.S. 447 (1978) and *Bates* v. *State Bar of Arizona,* 433 U.S. 350 (1977). This case, and the issues it presents, are no less worthy of Supreme Court attention.

This case also satisfies the certiorari criterion of Supreme Court Rule 10.1 (a) ("When a United States court of appeals has rendered a decision in conflict with the decision of another United States court of appeals on the same matter"). By its denial of mandamus, the Fifth Circuit has endorsed a procedure by which prior adjudications are not only admissible evidence, but conclusive evidence, which the accused is forbidden to contest. This approach squarely conflicts with the Eleventh Circuit decision in *United States* v. *Jones* and the Seventh Circuit decision in *Ming.* With that conflict, an attorney's ability to practice his profession in a case like this turns on whether the disbarment proceedings are conducted in the Eleventh Circuit or Seventh Circuit, or whether he suffers the misfortune of being prosecuted in the Eastern District of Texas whose procedure, paraphrased, is that "the truth is no defense."

The case for immediate Supreme Court review is compelling. The Local Rule 3 practice — by which a single person serve multiple roles which calls on him to decide whether he has proved his own charges — a practice sanctioned by the Fifth Circuit, is one which "so far depart[s] from the accepted and usual course of judicial proceedings . . . as to call for an exercise of this Court's power of supervision," Supreme Court Rule 10.1(a).

The proceedings below seek to permanently disbar Mr. Jaques from practicing in the Eastern District of Texas. The collateral effect of any ruling by the District Court may be to jeopardize his standing in state and federal bars across the country. In practical effect, the proceeding below seeks to destroy Mr. Jaques' career

and a practice that has been built over decades. If that is accomplished, without review of the constitutionality of the local rule on which that result is based, the damage will be irreparable. Review years after the fact, when Petitioner's career has been destroyed, will be no meaningful review at all. If Petitioner is substantively correct, and he is, immediate and authoritative direction from this Court is imperative.

RELIEF REQUESTED

For these reasons, Petitioner prays that this Court issue a Writ of Certiorari to review the November 4, 1996 Order of the United States Court of Appeals for the Fifth Circuit.

Respectfully submitted,

BENDURE & THOMAS
By: /s/ MARK R. BENDURE (P23490)
Counsel of Record
577 East Larned, Suite 210
Detroit, Michigan 48226-4392 (313) 961-1525
Attorneys for Petitioner

-and-

BERG & ANDROPHY
By: JOEL M. ANDROPHY
3704 Travis Street
Houston, Texas 77002 (713) 529-5622
Attorneys for Petitioner

Dated: December 4, 1996

No. _____

In The

Supreme Court of the United States

October Term, 1996

IN RE: LEONARD C. JAQUES,

Petitioner.

ON APPEAL FROM THE UNITED STATES COURT OF APPEALS
FOR THE FIFTH CIRCUIT

ON PETITION FOR WRIT OF CERTIORARI TO THE
UNITED STATES COURT OF APPEALS FOR THE FIFTH CIRCUIT

PETITIONER'S APPENDIX

ORDER DENYING RESPONDENTS' MOTION FOR RECUSAL

(United States District Court —
Eastern District of Texas—
Beaumont Division)

(Filed August 30, 1996)

(IN THE MATTER OF LEONARD C. JAQUES AND THE JAQUES ADMIRALTY LAW FIRM, P.C. — Case No. 6:96-MC-160)

Before the court is Respondents' Motion for Recusal.[1] This matter began on July 9, 1996, when the judges of

---

1 When faced with the possibility of sanctions, Jaques regularly files a motion to recuse the presiding judge. *See, e.g., Cook* v. *American Steamship Co.*, No. 91-CV-72412-DT (E.D. Mich. June 13, 1996) (order denying Jaques's motion to recuse presiding judge); *O'Neill* v. *AGWI Lines*, No. 95-40102 (5th Cir. March 6, 1996) (same). After being sanctioned in *Cook*, Jaques again filed a motion to recuse. *Cook* v. *American Steamship Co.*, No. 91-CV-72412-DT (E.D. Mich. July 18, 1996) (order denying Jaques's second motion to recuse presiding judge).

the Eastern District of Texas unanimously agreed, at a regular meeting, to initiate disciplinary proceedings against Leonard C. Jaques and The Jaques Admiralty Law Firm, P.C. (hereinafter collectively "Jaques") for violations of the Eastern District of Texas Local Court Rules 3(a) and 3(d)(1)(A)-(D). (The Order to Show Cause dated August 6, 1996 is incorporated herein and attached to this order.) Jaques seeks recusal arguing that this court is biased and prejudiced against him and that the court cannot impartially adjudicate this disciplinary proceeding.

Section 144 provides:

> Whenever a party to any proceeding in a district court makes and files a timely and sufficient affidavit that the judge before whom the matter is pending has a personal bias or prejudice either against him or in favor of any adverse party, such judge shall proceed no further therein, but another judge shall be assigned to hear such proceeding.
>
> The affidavit shall state the facts and the reasons for the belief that bias or prejudice exist, and shall be filed not less than ten days before the beginning of the term at which the proceeding is to be heard, or good cause shall be shown for failure to file it within such time. A party may file only one such affidavit in any case. It shall be accompanied by a certificate of counsel of record stating that it is made in good faith.

28 U.S.C. § 144. "Section 144 relates only to charges of actual bias." *Henderson* v. *Department of Public Safety and Corrections*, 901 F.2d 1288, 1296 (5th Cir. 1990). When a court passes on the legal sufficiency of the affidavit, it may not pass on the truth of the matters alleged. *Id.* Under section 144, a legally sufficient affidavit must meet the following requirements: "(1) the facts must be

material and stated with particularity; (2) the facts must be such that if true they would convince a reasonable man that a bias exists; and (3) the facts must show the bias is personal, as opposed to judicial, in nature." *Id.*

The literal ten-day requirement of section 144 no longer applies because formal terms of court were abolished long ago. *Pomeroy* v. *Merritt Plaza Nursing Home, Inc.*, 760 F.2d 654, 658 (5th Cir. 1985). "Instead, courts have simply required a party to exercise reasonable diligence in filing an affidavit after discovering facts that show bias." *Id.* The judge who is the subject of a motion for recusal need not refer consideration of the motion or affidavit to another judge. *In re Corrugated Container Antitrust Litigation*, 614 F.2d 958, 963 n.9 (5th Cir. 1980). In fact, such a procedure as a general rule is unwise. *Id.* In determining whether a court has bias or prejudice under sections 144 and 445(b), the court should apply the same legal standards under each section. *Id.* at 965.

Section 455 provides:

> (a) Any justice, judge, or magistrate of the United States shall disqualify himself in any proceeding in which his impartiality might reasonably be questioned.
>
> (b) He shall also disqualify himself in the following circumstance:
>
> (1) Where he has a personal bias or prejudice concerning a party, or personal knowledge of disputed evidentiary facts concerning the proceeding . . . .

28 U.S.C. § 455. The standards for determining impartiality depend on the source of the judge's alleged prejudice or bias. *In re Asbestos Litig.*, 90 F.3d 963, 989 (5th Cir. 1996). "To the extent that a judge has become biased due to facts he has learned during a judicial proceeding, he must recuse himself only if fair judgment would be impossible." *Id.* "If the alleged partiality stems

from a source other than a judicial proceeding, a judge must recuse himself if 'a reasonable and objective person, knowing all of the facts, would harbor doubts concerning the judge's [im]partiality.'" *Id.* (citing *United States* v. *Jordan*, 49 F.3d 152, 155 (5th Cir. 1955)).

In determining that the "extrajudicial source" doctrine applies to section 455(a), the Supreme Court explained:

> First, judicial rulings alone almost never constitute valid basis for a bias or partiality motion . . . In and of themselves (*i.e.*, apart from surrounding comments or accompanying opinion), they cannot possibly show reliance upon an extrajudicial source; and can only in the rarest circumstances evidence the degree of favoritism or antagonism required . . . when no extrajudicial source is involved. Almost invariably, they are proper grounds for appeal, not for recusal. Second, opinions formed by the judge on the basis of facts introduced or events occurring in the course of the current proceedings, or of prior proceedings, do not constitute a basis for a bias or partiality motion unless they display a deep-seated favoritism or antagonism that would make fair judgment impossible.

Liteky v. *United States*, 114 S. Ct. 1147, 1157 (1994). "[The words 'bias or prejudice'] connote a favorable or unfavorable disposition or opinion that is somehow *wrongful or inappropriate*, either because it is undeserved, or because it rests upon knowledge that the subject ought not to possess . . . or because it is excessive in degree . . . " *Id.* at 1155 (emphasis in original). "The judge who presides at a trial may, upon completion of the evidence, be exceedingly ill disposed towards the defendant, who has been shown to be a thoroughly reprehensible person. But the judge is not thereby recusable for bias or prejudice, since his knowledge and the opinion it produced were properly and

necessarily acquired in the course of the proceedings, and are indeed sometimes (as in a bench trial) necessary to completion of the judge's task." *Id.* "A motion to disqualify is committed to the sound discretion of the judge and [the] decision will only be reversed if there has been an abuse of that discretion." *In re Hipp, Inc.*, 5 F.3d 109, 116 (5th Cir. 1993).

Jaques argues that the court should disqualify itself from conducting this disciplinary proceeding for the following reasons: (1) the court's adjudication of this disciplinary proceeding pursuant to the local rules violates Jaques's due process rights because the court assisted the special prosecutor with the charges in this matter; (2) this court's staff had personal contact with a potential witness; and (3) the court has prejudged the character for truthfulness of Jaques.

After carefully reviewing Jaque's motion for recusal, the court determines that Jaques's motion and supporting affidavit do not require disqualification. Any facts learned by this court about Jaques and his firm were acquired through this disciplinary proceeding or the prior proceeding in which Jaques was sued for fraud on a client. *See Carroll* v. *Jaques*, 927 F. Supp. 216 (E.D. Tex. 1996). This court has no personal bias or prejudice, as defined by *Liteky*, 114 S. Ct. at 1155, against Jaques or his firm. In adjudicating these proceedings, the court can exercise fair judgment. *See In re Asbestos Litig.*, 90 F.3d at 989. In his affidavit, Jaques states that this court has had extrajudicial contacts with other courts and a potential witness.[2] Neither the court nor its staff have had any contact with anyone outside "the

---

2 The staff of this court have contacted staff of other federal district courts for the purpose of obtaining court records related to this proceeding. These records primarily consist of briefs filed by Jaques and the related orders. These records directly relate to the charges in the order to show cause in this proceeding. With respect to this court's contact with Thomas Emery as referenced in Jaques's

(*concluded on page A-6*)

course of the current proceedings, or of prior proceedings." *Liteky*, 114 S. Ct. at 1157. But, even assuming that these contacts can somehow be characterized as extrajudicial or outside the course of proceedings with Jaques, a reasonable and objective person, knowing all the facts, would not harbor doubts concerning this court's impartiality. *See In re Asbestos Litig.*, 90 F.3d at 989. This court has no deep-seated favoritism or antagonism that makes fair judgment impossible. In the hearing to show cause, the court will be concerned with prior judicial findings as to Jaques's behavior rather than necessarily the content of Jaques's personal character.

Jaques argues that the court's adjudication of this disciplinary proceeding pursuant to the local rules violates Jaques's due process rights because the court assisted the special prosecutor with the charges in this matter. Jaques cites *In re Medrano*, 956 F.2d 101, 102 n. 2 (5th Cir. 1992) for the proposition that this court cannot conduct this proceeding because this same court brought the information related to Jaques's misconduct to the full court of the Eastern District, which in turn

---

(*continued from page A-5*)

affidavit, Mr. Emery initiated contact with this court for the purpose of obtaining a copy of an order entered in the fraud case against Jaques. This order, unpublished at the time of Mr. Emery's request, is published under the style *Carroll* v. *Jaques*, 926 F. Supp. 1282 (E.D. Tex. 1996). This contact with Mr. Emery in no way affects this court's impartiality. The parties have represented to the court that they have no intention of calling Mr. Emery as a witness. Additionally, Mr. Emery's testimony probably would have little relevance to these proceedings.

Strangely, Jaques views this court's extension of a courtesy to a lawyer, Mr. Emery, as a basis for bias and prejudice. Just two days ago, Jaques's counsel contacted this court's staff by telephone seeking an extension of time to file briefs in this matter. Without hesitation, the court extended a courtesy to Jaques's counsel and allowed them to file Jaques's briefs a day after the court's deadline set out in the order to show cause.

initiated this disciplinary proceeding. Jaques relies on an oblique reference by the Fifth Circuit to some other districts' local rules. The Fifth Circuit referred the Western District of Texas to these rules to assist it in adopting a formal disciplinary rule. *Id.* Jaques argues that these other districts' local rules, which the Fifth Circuit refers to, do not allow the judge who complains of alleged lawyer misconduct to conduct the resulting disciplinary proceeding. The Fifth Circuit in the *Medrano* decision, however, did not require the district court that initiated the disciplinary proceeding to recuse itself from adjudicating the proceeding to a conclusion. *Id.* at 103-105. In fact, the Fifth Circuit remanded the case to the district court to conduct further proceedings applying the correct evidentiary standard. *Id.* at 105.

Although this court assisted the special prosecutor in the preparation of the charges in this matter, this assistance in no way denies Jaques or his firm due process. The assistance provided to the special prosecutor was at the genesis of this proceeding.[3] Obviously, it is the court which initially became aware of certain instances of misconduct by Jaques which suggested the need for this disciplinary proceeding. The court must then decide whether to appoint a special prosecutor, and if one is appointed, inform the special prosecutor of the nature and scope of his duties. In his affidavit, Jaques establishes no injury to his due process rights on account of the assistance provided to the special prosecutor. Jaques merely states that this is another instance of bias or prejudice. As noted previously, these types of occurrences in the course of proceedings cannot be a basis for recusal.

---

3 This court has had no other contact with the special prosecutor except to (1) provide him court documents on occasion and (2) arrange telephone conferences in which all counsel were in attendance.

Finally, Jaques argues that this court has prejudged his character for truthfulness. Jaques's affidavit proffers two bases. First, this court's previous order in the fraud action against Jaques states: "When Jaques proffers excuses, mitigating circumstances, and justifications for his abusive behavior, the court, however, must take into account that Jaques's credibility is weak." *Carroll* v. *Jaques*, 926 F. Supp. at 1290. Second, at a pretrial hearing in the fraud case against Jaques, this court stated: "[T]hen, what you're telling me is,] you're afraid that your client may have told you other things that are untrue?" Sealed Tr. dated Feb. 20, 1996 at 16 (bracketed text was omitted from Jaques's motion and affidavit).[4] In this instance, the court was not making a statement about Jaques's credibility but rather attempting to clarify a position taken by one of Jaques's lawyers. With respect to both of the foregoing instances cited by Jaques, the court determines that these statements by this court are not indicative of any personal bias or prejudice against Jaques or his firm. *See Liteky*, 114 S. Ct. at 1155. Moreover, these instances occurred within the course of prior proceedings. *Id.* at 1157.

In sum, Jaques has not shown that this court has bias or prejudice against him, and that this court cannot

---

4 At this hearing just minutes before trial was to begin, Jaques's lawyers moved to withdraw from the case because of an "ethical conflict" and an "irreconcilable conflict" with their client. Sealed Tr. dated Feb. 20, 1996 at 10, 15. (Jaques's partner, Robert Swickle, was in attendance at this hearing; Jaques did not attend this hearing or the trial.) Jaques's lawyers argued that they were unable to zealously represent their client. On the eve of trial, plaintiff's counsel discovered key documents in the possession of a third party that should have been included among the documents that Jaques provided to his lawyers for mandatory disclosure. *Id.* at 4-9. The newly discovered documents were contrary to positions that Jaques had taken throughout the proceedings, including sworn testimony. *Id.* at 5-6, 10-11, 13, 15-16, 26-27. At no time during this prior proceeding against Jaques did this court have any doubt about the honesty and integrity of Jaques's counsel. Under difficult circumstances, Jaques's counsel performed competently and professionally at all times.

impartially adjudicate this disciplinary proceeding. Accordingly, Respondents' Motion for Recusal is hereby DENIED.

SIGNED this 30th day of August 1996.

/s/ RICHARD A. SCHELL
UNITED STATES DISTRICT JUDGE

ORDER DENYING WRIT OF MANDAMUS

(United States Court of Appeals — Fifth Circuit)

(Filed September 16, 1996)

(In Re: LEONARD C. JAQUES; THE JAQUES ADMIRALTY LAW FIRM, PC, Petitioners; No. 96-40895)

Petition for Writ of Mandamus to the United States District Court for the Eastern District of Texas, Tyler.

Before HIGGINBOTHAM, WIENER and BENAVIDES, Circuit Judge.*

BY THE COURT:

IT IS ORDERED that the petitioner's motion to place case under seal is GRANTED.

IT IS FURTHER ORDERED that the petition for writ of mandamus is DENIED.

---

* **This case is being decided by a quorum.** ***See*** **28 U.S.C. § 46(d).**

ORDER DENYING WRIT OF MANDAMUS

(United States Court of Appeals — Fifth Circuit)

(Filed November 4, 1996)

(IN RE: LEONARD C. JAQUES, Petitioner; No. 96-41076)

Petition for Writ of Mandamus to the United States District Court for the Eastern District of Texas, Beaumont.

BEFORE HIGGINBOTHAM, WIENER and BENAVIDES, Circuit Judges.

BY THE COURT:

IT IS ORDERED that the Petitioner's motion to place case under seal is GRANTED.

IT IS FURTHER ORDERED that the petition for writ of mandamus is DENIED.

ORDER TO SHOW CAUSE

(United States District Court —
Eastern District of Texas —
Beaumont Division)

(Filed August 6, 1996)

(IN THE MATTER OF LEONARD C. JAQUES AND THE JAQUES ADMIRALTY LAW FIRM, P.C. — Case No. 6:96-MC-160)

On July 9, 1996, the judges of the Eastern District of Texas unanimously agreed to initiate disciplinary proceedings against LEONARD C. JAQUES and THE JAQUES ADMIRALTY LAW FIRM, P.C. (hereinafter collectively "Jaques" for violations of the Eastern District of Texas Local Court Rules 3(a) and 3(d)(1)(A)-(D). Accordingly, pursuant to Local Rule 3, Jaques and a corporate representative of his firm are hereby ORDERED to appear and show cause why discipline, up to and including disbarment from this district, should not be ordered against them for violations of Local Rule 3(d)(1)(A)-(D) and Texas Disciplinary Rules of Professional Conduct 3.04(c)(5), 3.04(d), 5.01, 8.02(a), 8.04(a)(3), and others as incorporated in Local Rule 3(a). Jaques and his firm may be subject to discipline under the foregoing rules for past and continuous actions injurious to clients, attorneys, courts and other participants in the legal system. At a minimum, the court will consider the following instances of Jaques's conduct:

(1) On June 13, 1996, the Eastern District of Michigan sanctioned Jaques for physically assaulting opposing counsel in open court during a recess in a trial. *Cook* v. *American Steamship Co.*, No. 91-CV-72412-DT (E.D. Mich. June 13, 1996).

(2) On May 21, 1996, this court sanctioned Jaques for abusive and disruptive behavior

during his deposition. *Carroll* v. *Jaques*, 926 F. Supp. 1282, 1284 (E.D. Tex. 1996).

(3) On May 2, 1996, Judge Charles Weiner administratively dismissed approximately 18,000 maritime cases pending in MDL 875 because Jaques failed to comply with the pretrial orders of the court. *In re Asbestos Products Liability Litigation*, 1996 WL 239863 (E.D. Pa. 1996).

(4) On March 4, 196, a judgment was entered against Jaques and his firm based on a jury finding that they committed fraud on a client. *Carroll* v. *Jaques*, 927 F. Supp. 216, 219 (E.D. Tex. 1996).

(5) On January 6, 1995, Judge Kent of the United States District Court for the Southern District of Texas dismissed one of Jaques's cases and assessed Jaques attorney's fees for refusal to comply with discovery orders and "blatant forum shopping." *O'Neill* v. *AGWI Lines*, 74 F.3d 93, 95 (5th Cir. 1996) (affirming sanctions under Rule 37(b)(2)).

(6) On May 6, 1985, the Sixth Circuit affirmed a district court's decision to hold Jaques in civil contempt for violating an order to appear for trial and for lying to two federal judges regarding his whereabouts and reason for his failure to appear. *In re Jaques*, 761 F.2d 302, 304 (6th Cir. 1985).

In addition to these six instances, the court may consider similar actions of Jaques and his firm that were injurious to clients, attorneys, courts, and other participants in the legal system.

In accordance with Local Rule 3(d)(2)(B), this show cause hearing is herely scheduled for September 4, 1996

at 9:00 a.m. Under Local Rule 3(d)(2)(B), the court specially appoints Thomas P. Roebuck, Jr. to prosecute the charges in this matter. The court ORDERS Jaques and the special prosecutor to file briefs on this matter on or before August 28, 1996. The briefing shall include all legal standards governing discipline and disbarment of both attorneys and their firms, which may be applicable in this matter. In addition, Jaques shall file a response to the charges listed in this order to show cause on or before August 28, 1996.

SIGNED this the 6th day of August 1996.

/s/ RICHARD A. SCHELL
UNITED STATES DISTRICT JUDGE

AMENDED ORDER TO SHOW CAUSE

(United States District Court —
Eastern District of Texas —
Beaumont Division)

(IN THE MATTER OF LEONARD C. JAQUES and THE JAQUES ADMIRALTY LAW FIRM — CIVIL ACTION NO. 6:96-MC-160)

On July 9, 1996, all the judges of the Eastern District of Texas unanimously agreed to initiate disciplinary proceedings against LEONARD C. JAQUES and THE JAQUES ADMIRALTY LAW FIRM, P.C. for violations of the Eastern District of Texas Local Court Rule 3(a) and Rule 3(d)(1)(A-D). Subsequently, on September 13, 1996, the Court entered an Order directing the special prosecutor to abandon any proceedings against the JAQUES ADMIRALTY LAW FIRM, P.C. Accordingly, the proceedings against THE JAQUES ADMIRALTY LAW FIRM, P.C. are DISMISSED. Further, pursuant to Local Rule 3, LEONARD C. JAQUES (hereinafter sometimes referred to as "JAQUES") is hereby ORDERED to appear and show cause why discipline, up to and including disbarment from this District, should not be ordered against him for violations of Local Rule 3(d)(1)(A-D), and the Texas Disciplinary Rules of Professional Conduct 3.04(c)(5), 3.04(d), 3.01, 3.03(a)(1), 8.04(a)(2) and 8.04(a)(3), as incorporated under Local Rule 3(a). JAQUES may be subject to discipline under the foregoing rules for past and continuous actions injurious to clients, attorneys, courts, and other participants in the legal system. The Court will consider the following instances of JAQUES' conduct:

1. On June 13, 1996, in the Eastern District of Michigan, in open court, JAQUES committed an assault on opposing counsel. Rules violated: Local Rule 3(d)(1)(A) (conduct unbecoming a member of the Bar), Rule 8.04(a)(2) Texas Disciplinary Rules of Professional Conduct (committing a criminal act reflecting adversely on the lawyer's fitness as a lawyer) and Rule 3.04(c)(5)

(a lawyer shall not engage in conduct intended to disrupt the proceedings).

Rule 8.05 of the Texas Disciplinary Rules of Professional Conduct provides in pertinent part as follows: "A lawyer is subject to disciplinary authority of this state if admitted to practice in this state or if specifically admitted by a court of this state for a particular proceeding."

In addition to being answerable for his or her conduct occurring in this state, any such lawyer also may be disciplined in Texas for conduct occurring in another jurisdiction or resulting in lawyer discipline in another jurisdiction, if it is professional misconduct under Rule 8.04. Additionally, Rule 1.06(Q)(2) Texas Rules of Disciplinary Procedure defines professional misconduct as "attorney conduct that occurs in another state or in the District of Columbia and results in the disciplining of an attorney in that other jurisdiction, if the conduct is Professional Misconduct under the Texas Disciplinary Rules of Professional Conduct."

The Preamble to the Texas Disciplinary Rules of Professional Conduct provides, in pertinent part, as follows:

> 4. A lawyer's conduct should conform to the requirements of the law, both in professional service to clients and in the lawyer's business and personal affairs. A lawyer should use the law's procedures only for legitimate purposes and not to harass or intimidate others. A lawyer should demonstrate respect for the legal system and for those who serve it, including judges, other lawyers and public officials. While it is a lawyer's duty, when necessary, to challenge the recitude of official action, it is also a lawyer's duty to uphold legal process.

* * *

> 9. Each lawyer's own conscience is the touchstone against which to test the extent to which his actions may rise above the disciplinary standards prescribed by these rules. The desire for the respect and confidence of the members of the profession and of the society which it serves provides the lawyer the incentive to attain the highest possible degree of ethical conduct. The possible loss of that respect and confidence is the ultimate sanction. So long as its practitioners are guided by these principles, the law will continue to be a noble profession. This is its greatness and its strength, which permit of no compromise.

By assaulting opposing counsel in open court, JAQUES indicated an inability to conform his conduct to the minimum standards required by the Texas Disciplinary Rules of Professional Conduct, disrupted an official proceeding, and adversely affected the image of the public toward the legal profession. Further, he has revealed an inability to control his conduct and his emotions within the very arena in which he has chosen to function. Assaulting one's adversary in open court clearly is conduct disruptive of judicial proceedings.

2. On February 1, 1996, JAQUES engaged in abusive and disruptive behavior during his deposition in a case styled, *Dermot Patrick Carroll* v. *Leonard C. Jaques, et al*, in the United States District Court for the Eastern District of Texas, Beaumont Division, Civil Action No. 1:95-CV-87. Rules violated: Local Rule 3(d)(1)(A-D), 3.04(c)(5) and 3.04(d), Texas Rules of Disciplinary Conduct.

On May 21, 1996, this Court sanctioned JAQUES for abusive and disruptive behavior during his deposition. Rules violated: Local Rule 3(d)(1)(A-D) and Rules 3.04(c)(5) and 3.04(d), Texas Disciplinary Rules of Professional Conduct.

Discussion: As previously mentioned, the Texas Rules of Disciplinary Conduct assume that a lawyer will maintain a high degree of not only professional but personal integrity. As such, some of the Rules of Professional Conduct apply to the conduct of the lawyer, whether it be professional or personal. Be that as it may, JAQUES made his election to appear as counsel, as well as an individual litigator, in the above-entitled and numbered cause. Specifically, during the deposition of JAQUES, the following dialog occurred.

Page 80, Line 12

Q. (By Mr. Blanks) How long does it usually take you to get a new claim filed from the time it comes in?

(Mr. Cluck) Excuse me. Again, this goes beyond the issues that are presently pending before the court. If you have an answer for him.

A. (By Mr. Jaques) I think the whole thing is. I think you ought to limit this thing. *In fact, I'll make my appearance. Hold up. I'll make my appearance of counsel and start limiting myself.*

Regarding the violations of Local Rule 3(d)(1)(A-D) and Rule 3.04(c-d), and Texas Disciplinary Rules of Professional Conduct 3.04(c)(5), JAQUES made, among others, the following comments during his deposition:

Q. (By Mr. Blanks) What's the present net worth of the, the corporation, the law firm?

(By Mr. Cluck) Excuse me. Object that that's private and protected as a . . .

(By Mr. Blanks) Mr. Cluck, it's about the only evidence that's readily recognized as bearing on the exemplary damage quantum and I think our courts have held so.

(By Mr. Jaques) Well, you're going to have to get an order from the court before you ever get that information.

Q. (By Mr. Blanks) How about your own net worth, Mr. Jaques? What is that?

(By Mr. Cluck) Excuse me. Object also that this is protected by a —

(By Mr. Jaques) (Interrupting) Get off my back, you slimy son-of-a-bitch.

(By Mr. Blanks) I beg your pardon, sir?

(By Mr. Jaques) You slimy son-of-a-bitch.

(By Mr. Blanks) You're not going to cuss me, Mr. Jaques.

(By Mr. Jaques) You're a slimy son-of-a-bitch.

(By Mr. Blanks) You can cuss your counsel. You can cuss your client.

(By Mr. Jaques) (Interrupting) I'll cuss you.

(By Mr. Blanks) You can cuss yourself. You're not going to cuss me. We're stopping right now.

(By Mr. Jaques) You're damn right.

(By Mr. Blanks) We'll resume with Judge Schell tomorrow. Thank you.

(By Mr. Jaques) Come on. Let's go.

(By Mr. Blanks) Good evening, sir.

(By Mr. Jaques) Fuck you, you son-of-a-bitch.

(By Mr. Blanks) Let's stay on the record until Mr. Jaques has finished his diatribe. We'll be happy to see you back soon, Mr. Jaques. Good evening, sir.

(By Mr. Jaques) (Interrupting) Fuck you. Fuck you.

(By Mr. Blanks) And I wish you a safe trip wherever you're going. Would you please let

> the record show that Mr. Jaques and his counsel and the two ladies in company with Mr. Jaques have left the room.
>
> (Deposition of Leonard C. Jaques dated February 1, 1996, in *Dermot Patrick Carroll* v. *Leonard C. Jaques, et al*, Page 214, line 5 through Page 216, line 4.)

Using the above-described unsolicited and gratuitous profanities against opposing counsel during the course of the deposition, JAQUES again revealed an inability to control his emotions and/or his conduct during the course of an adversary proceeding and disrupted the process of the deposition and the proceedings. The deposition, taken as a whole, reveals that some 218 pages in length conducted over at least a five-hour period. The delay in the proceedings was largely due to side bar remarks, recesses called by JAQUES, evasive answers and impermissible objections.

Regarding the violation of Local Rule 3(d) and the Texas Disciplinary Rules of Professional Conduct 3.04(d), Article Six (6) of the Civil Justice Expense and Delay Reduction Plan provides, in pertinent part, as follows: "Attorneys are prohibited from instructing the deponent not to answer a question or how to answer a question, except to assert a recognized privilege. Other objections shall be made at trial." JAQUES previously entered his appearance as counsel of record and made his own objections throughout the deposition, thereby failing to comply with the Civil Justice Expense and Delay Reduction Plan. Further, he violated Rule 3.04(d) by knowingly disobeying an established rule under the Civil Expense and Delay Reduction Plan.

3. On May 2, 1996, Judge Charles Weiner administratively dismissed, without prejudice, approximately 18,000 maritime cases pending in MDL 875, because JAQUES failed to comply with the pretrial orders of the court. *In re Asbestos Products Liability Litigation*, 1996

WL 239863 (E.D. Pa. 1996). Rules violated: 3.01, 3.04(c)(5) and 3.04(d) Texas Rules of Disciplinary Conduct.

Discussion: On or about July 18, 1995, Judge Weiner entered a pre-trial discovery order requiring JAQUES to submit proof of asbestos exposure in thousands of asbestos claims pending in his court. According to Judge Weiner's order, JAQUES submitted that he had not supplied the details relating to the asbestos exposure to the defendants. In dismissing the 18,000 cases pending filed by JAQUES, the Court made the following findings:

> The Court believes that it is the responsibility of counsel to only file those cases which are ripe and ready to proceed. To file cases by the thousands and expect the Court to sort out the actionable claims is improper and a waste of the Court's time. Other victims suffer while the Court is clogged with such filings.

Basically, the court determined that JAQUES brought a proceeding that was frivolous, and after giving JAQUES an opportunity to present evidence and/or documentation connecting his thousands of clients' conditions with asbestos exposure, he failed to do so. The result was that perhaps some of JAQUES' meritorious cases were dismissed and, in fact, the prosecution and defense of other cases pending before the court was delayed by JAQUES' clogging of the docket.

4. On March 4, 1996 a judgment was entered against JAQUES and his firm based on a jury finding that they committed fraud on a client. *Carroll* v. *Jaques*, 927 F. Supp. 216, 219 (E.D. Tex 1996). Rule violated 804(a)(3).

Discussion: In the above-entitled and numbered cause, JAQUES was sued for malpractice, including, among other things, an allegation of fraud. The Court instructed the jury that in order to find JAQUES guilty of fraud, it must occur based upon clear and convincing evidence, not merely a preponderance of the evidence.

The jury found JAQUES guilty of fraud. Under Rule 804(a)(3), it is a violation of the Disciplinary Rules of Professional Conduct to be found guilty of conduct involving a fraud.

5. On January 6, 1995, Judge Kent of the United States District Court for the Southern District of Texas dismissed one of JAQUES' cases and assessed JAQUES attorney's fees for refusal to comply with discovery orders and "blatant forum shopping." *O'Neill* v. *AGWI Lines*, 74 F.3d 93, 95 (5th Cir. 1996) (affirming sanctions under Rule 37(b)(2)). Rules violated: 3.01, 3.04(c)(5) and 3.04(d) Texas Disciplinary Rules of Professional Conduct.

Discussion: As with Judge Weiner, JAQUES failed to comply with the Court's discovery order and was sanctioned for his conduct.

6. On May 6, 1985, the Sixth Circuit affirmed a district court's decision to hold JAQUES in civil contempt for violating an order to appear for trial and for lying to two federal judges regarding his whereabouts and for his failure to appear. *In re Jaques*, 761 F.2d 302, 304 (6th Cir. 1985). Rule violations of Local Rule 3(d)(1)(A-C), and Texas Disciplinary Rules of Professional Conduct 3.03(a)(1).

Discussion: JAQUES lied to two federal judges and was held in contempt for his actions. Clearly, such constitutes a false statement of material fact to a tribunal.

In accordance with Local Rule 3(d)(2)(B), this Show-Cause Hearing is hereby scheduled for November 12, 1996, at 9:00 a.m. Under Local Rule 3(d)(2)(B), Thomas P. Roebuck, Jr. is appointed Special Prosecutor in this matter.

RICHARD A. SCHELL
UNITED STATES DISTRICT JUDGE

AFFIDAVIT OF LEONARD C. JAQUES

(United States District Court —
Eastern District of Texas —
Beaumont Division)

(Dated August 27, 1996)

(IN THE MATTER OF LEONARD C. JAQUES AND THE JAQUES ADMIRALTY LAW FIRM, P.C. — Case No. 6:96-MC-160)

STATE OF MICHIGAN
COUNTY OF WAYNE — ss.

My name is Leonard C. Jaques. I am over the age of majority and competent to testify and have personal knowledge of the matters in this affidavit.

1. On August 12, 1996, my office received in the mail a copy of an Order to Show Cause signed by Judge Richard Schell, and entered on August 6, 1996. This order to show cause contains six allegations of professional misconduct against myself and The Jaques Admiralty Law Firm, P.C. These charges were drafted by Judge Schell. The order to show cause directs me to appear before Judge Schell on September 4, 1996, and prove why I am not subject to professional discipline by this Court. Most, if not all, of the allegations in the order to show cause involve disputed evidentiary facts. Count one requires a finding as to whether the alleged assault was legally justified, and will require the court to decide disputed facts underlying that incident. Count two, at a minimum, requires the Court to decide whether a lawyer who was taking my deposition provoked me into losing my temper. Count three requires a finding as to whether my firm or I was guilty of professional misconduct. Count four requires a specific finding that my firm or I am guilty of fraud. Count five requires a finding that I am guilty of professional misconduct for "blatant forum shopping," or any other misconduct. Count six requires a finding that I lied to federal judges. Because

these charges are based on Judge Schell's investigation, and were drafted by Judge Schell, he is necessarily biased or prejudiced regarding the underlying facts.

2. Based upon the information that has been garnered with respect to the proceedings that have ensued these past several months, there is a clear indication that Judge Schell has vigorously engaged in an investigation of matters to which the charges relate. Sufficient facts have become known to your Affiant with respect to those activities to suggest at a minimum and absolutely confirm in some instances that Judge Schell has, through the means at his hands, either directly or indirectly, personally or otherwise, contacted the Courts involved to obtain a read on episodes of the charges. Indeed, it is known that Judge Schell through his mechanism contacted and discussed with the Court or the staff personnel of Judge Weiner's Court, matters that relate to the Philadelphia charge; that he did the same with respect to Judge Friedman's Court and responded to requests from Judge Friedman's Court in the spirit of cooperation with that Court; and under the surmise that Judge Schell would accomplish any task in yeoman fashion that he undertook, the conclusion is drawn that he availed himself of facts, opinions, discrepancies and other criteria in pursuit of thoroughness as to all the available background with respect to the charges from any and all sources within the grasp of the system he employed through himself and his good offices.

3. Furthermore, documents show that Judge Schell has communicated with a potential witness at the September 4 hearing, Mr. Thomas Emery, a Detroit lawyer. Attached to my affidavit is a true and correct copy of the first page of an exhibit filed by Emery in the Eastern District of Michigan, in support of a motion he filed in the proceeding referenced in count one of Judge Schell's show cause order. Mr. Emery sought to disqualify me from the Michigan case; Judge Friedman

denied that request. This exhibit was a copy of Judge Schell's May 21, 1996 order imposing sanctions, which is the subject of count two of the show cause order. The dataline at the bottom of this exhibit shows that it was faxed by Richard Schell on May 24, only 3 days after the order was entered. It is impossible for me to know whether Judge Schell or Mr. Emery discussed the facts underlying the show cause order. At a minimum, however, the following is evidenced by this document and the surrounding circumstances: (1) there has been some contact between Judge Schell and Mr. Emery; (2) by furnishing an exhibit, Judge Schell provided assistance to Mr. Emery in prosecuting the Michigan sanctions motion; (3) Judge Schell has decided to reconsider whether I should receive discipline under the same allegations that the Michigan district court has already considered; and (4) Mr. Emery has volunteered to testify before Judge Schell. These circumstances create, at a minimum, an appearance of bias or prejudice.

4. On February 20, 1996, Judge Schell made statements in a sealed transcript that evidence his speculation that I had lied to my trial counsel. A sealed copy of that transcript is filed with this affidavit. Judge Schell's speculation evidences bias or prejudice regarding my credibility.

5. On May 21, 1996, Judge Schell signed a memorandum order that states: "When Jaques offers excuses, mitigating circumstances, and justifications for his abusive behavior, the court, however, must take into account that Jaques' credibility is weak." To support this statement, Judge Schell relied on three court opinions that had not been raised at the hearing on sanctions on April 24, 1996. Consequently, without offering me an opportunity to rebut or explain the facts underlying those decisions, Judge Schell decided that the opinions were factually correct. Moreover, two of the counts in Judge Schell's show cause order concern two of the opinions that formed the basis for his already-

formed conclusion that "Jaques' credibility is weak." Therefore, Judge Schell has already stated his conclusion that the allegations contained in those two counts are true. Because these conclusions were based on *ex parte* research rather than evidence introduced at the April 24 hearing, Judge Schell is impermissibly biased or prejudiced regarding my credibility.

I declare the factual contents of this affidavit are true to the best of my knowledge except as to matters predicated on information, and as to those matters, your affiant believes them to be true.

Dated this 27th day of August, 1996, at Detroit, Michigan.

/s/ Leonard C. Jaques

(*Jurat Omitted*)

TRANSCRIPT OF HEARING

(United States District Court —
Eastern District of Texas —
Beaumont Division)

(Proceedings of August 29, 1996)

(IN RE: IN THE MATTER OF: LEONARD C. JAQUES AND THE JAQUES ADMIRALTY LAW FIRM — Civil Docket No. 6:96mc160)

Beaumont, Texas
August 29, 1996 – 9:13 a.m.

BEFORE THE HONORABLE RICHARD A. SCHELL,
UNITED STATES DISTRICT JUDGE

APPEARANCES:
FOR THE GOVERNMENT: MR. THOMAS P. ROEBUCK,
1240 Orleans, Beaumont, Texas 77701;
FOR LEONARD C. JAQUES: MR. JOEL M. ANDROPHY,
3704 Travis, Houston, Texas 77002,
and MR. JEFF NOBLES, MS. TERESA ARGUINDEGUI,
1000 Louisiana St., Ste. 4300,
Houston, Texas 77002-5012
(NOTE: Counsel for Mr. Jaques
all appeared by telephone.);
FOR THE JAQUES ADMIRALTY LAW FIRM:
MR. GEORGE MICHAEL JAMAIL,
550 Fannin, 7th Floor, Beaumont, Texas 77701

* * *

(2) August 29, 1996
9:13 a.m.

THE COURT: This case is styled *In re: Leonard C. Jaques and the Jaques Admiralty Law Firm*, and the Cause Number is 6:96mc160.

In the courtroom I have Tom Roebuck and Mike Jamail. I understand Mr. Jamail represents the Jaques

Admiralty Law Firm and you, Mr. Androphy, represent Leonard C. Jaques, Individually.

MR. ANDROPHY: Yes, sir.

THE COURT: Okay.

MR. ANDROPHY: And I have in the office, here, Judge, Jeff Nobles and Teresa Arguindegui, with Haynes & Boone.

THE COURT: All right.

MR. NOBLES: Good morning, Your Honor.

THE COURT: Good morning. I wanted to visit with all of you just to tell you what I perceive in this hearing that's coming up next Wednesday.

I don't know if you're planning to bring witnesses to the hearing. I wanted to say that I don't see the need for testimony at the hearing. If you believe that testimony is necessary, I'd be happy to hear from you as to what testimony you think would be relevant to the instances of conduct that I've cited in the Order to Show Cause, but it seems to me that there aren't any fact issues remaining on these particular (3) instances of conduct, just mainly legal arguments.

The instances that I've cited in the Order to Show Cause involve situations that have already been judicially determined. There wouldn't be any reason to reopen those judicial determinations.

What I really want to hear next Wednesday are legal arguments from both sides on why these occasions of misconduct are or are not sufficient grounds for discipline, so I don't see the necessity for witnesses, like character witnesses. I'm going to be focusing on actual conduct and actions rather than on reputation or character.

Do you see it differently, Mr. Androphy?

MR. ANDROPHY: Judge, two things. One is — I'll address that in a second if the Court would permit. We have filed a — I have to address this first so I don't waive it on the recusal issue. That's not something I relish bringing up, but that's something that we did, in fact, file, and I just want to bring that up with the Court.

The second thing is, on the testimony at the hearing, I talked to Tom Roebuck sometime last week and indicated to him that I was intending on calling — I didn't know, as of yet, since we've been working vigorously on our pleadings, what I was going to do in terms of witnesses, but my main intent was to call an expert witness, Steve Peterson, who is the former general counsel for the state bar, in terms (4) of the allegations of misconduct by Mr. Jaques, whether they would have met certain requirements set out by the State Bar that would necessitate discipline and what the punishment would have been if, in fact, that they were State Bar violations.

THE COURT: All right.

MR. ANDROPHY: And I'm not intruding on the Court's authority, but just to, like in certain cases experts are permitted, as the Court knows, to discuss not only the factual aspects, but sometimes the legal aspects, especially in matters of discipline where the courts and the State Bar and the ABA seems to be concerned for some uniformity throughout the jurisdictions, not just isolated to one district or one state, but there's some attempt to allow everyone to be disciplined similarly for the same conduct and not have conduct in one place be treated one way and treated a totally different way somewhere else.

So, my intent was to call Steve Peterson briefly. He's going to have familiarity with all the six counts that the Court has mentioned in the Show Cause Order. And we have sent the Court, Your Honor, an analysis of Texas disbarments since January of '94, and also selected suspensions from the State Bar. Basically, we have taken them from the Bar Journal and the Court should have the last two and a half years of Bar Journals this morning in bound copies. And we've also gone (5) through the ABA rules.

Part of my — Mike Jamail and I — when I talk for myself, I'm basically also, I think, talking for Mike. We've discussed these issues and they're sort of joint argu-

ments — is to present Steve Peterson to give a global view of Mr. Jaques' charges and how the State Bar would have handled it under the same or similar circumstances.

With regard to other witnesses, I had not intended — I thought about it on the issues of character, but it was not intended that we were going to pursue that area. Of course, Mr. Jaques could be a witness. I haven't even decided that, although, as I understand, Mr. Roebuck may even want to call him, possibly. I don't know what his intentions are in that regard, but I have not gone that far in terms of analysis. I guess if this was a pretrial order, I'd say Steve Peterson will be a witness and Leonard Jaques may be a witness.

With regard to the other matters, I just felt that, from our review of the case law, that in this type of hearing, it was Mr. Roebuck's burden to go forward and then us to meet with Mr. Roebuck and present it to the Court, and we're still in the process, Judge. That's pretty much my mind set at this point. We're still in the process of analyzing it. I don't know how much, as a matter of law, Mr. Roebuck has to put in to be legally sufficient in terms of any type of proposed (6) ruling by the Court.

These disciplinary matters, as I'm sure the Court is well aware of, are somewhat confusing when you read how the cases have analyzed it. There doesn't seem to be necessarily a standard procedure, but there is a requirement for at least due process.

That's pretty much it at this point in time, Judge. I thought, basically, in summary, Steve Peterson and possibly Leonard Jaques, if I felt it was necessary, with regard to an explanation of the charges.

THE COURT: Okay. Well, I just wanted to have this discussion this morning in order to give all the lawyers some idea of what I would be looking for, and to hear from you what you thought I should hear.

Mr. Roebuck is at the podium. Let me ask him if he has any remarks.

MR. ROEBUCK: Your Honor, the Show Cause —

THE COURT: Can you hear Mr. Roebuck, Mr. Androphy?

MR. ANDROPHY: Could you speak up just a little louder?

MR. ROEBUCK: Okay. The Show Cause Order indicates that the Court may consider other actions that Mr. Jaques may have engaged in.

Your Honor, I have discovered some, what I believe at least as serious if not more serious, allegations, which I (7) believe, perhaps, will affect whether or not Mr. Jaques was ever even properly been admitted to this court.

I don't feel comfortable, from a due process standpoint, presenting those issues unless they have been properly broached in a show cause order and, for that reason, Your Honor, it might be appropriate, based upon the information that I have, to amend the Show Cause Order to give Mr. Jaques time to respond to those allegations.

THE COURT: All right. Do you think it would be reasonable to go forward on the allegations that are contained in the current Show Cause Order, and then to re-evaluate whether you want to add allegations after that, or do you think it better to, and are you requesting, to file an amended show cause order?

MR. ROEBUCK: Your Honor, I believe that would be the appropriate way to do this, is for me to move to amend the Show Cause Order, which, obviously, would create a problem with going forward next Wednesday. And I'm not saying, at this point in time that I'm positive that I'm going to do that, but the information I received yesterday is pretty compelling, and I've just got to follow it up and make sure it's correct.

THE COURT: Okay. So, you might know the first part of next week whether you want to make that request?

MR. ROEBUCK: Yes, sir.

(8) THE COURT: Okay. All right. Well, I guess until you evaluate whatever information it is you received yesterday, you don't know what kind of witnesses you would want to call, or anything else.

MR. ROEBUCK: If the information I have is correct, it would not necessitate the calling of witnesses, because it would be, basically, the Court taking judicial notice of some prior court rulings, and then comparing that to what was filed when Mr. Jaques applied to this Court for admission, and applied to some other courts to be admitted *pro hac vice*. So, I don't believe it would require testimony, it probably would require me to obtain certified copies of documents for admissibility purposes, but as far as testimony, I don't believe that would be necessary.

THE COURT: Okay. Well, I wanted to make clear to all the lawyers that, in my opinion, based on the six instances that I've cited in this Order to Show Cause, that I didn't see the necessity to bring in witnesses to re-open these occurrences, and I don't intend to re-open the findings that have already been made on these six occurrences. So that was the reason I wanted to get Mr. Androphy on the phone and get the two of you to come over, or be on the phone.

Let me ask, Mr. Jamail, do you have anything you want to say?

MR. JAMAIL: Your Honor, on behalf of the Jaques Law (9) Firm, I wanted to just bring it to the Court's attention that this —

MR. ANDROPHY: Judge, I can't hear.

MR. JAMAIL: All right. I'm sorry.

THE COURT: Just get real close to the microphone.

MR. JAMAIL: I'm going to speak loud. I hope I'm not speaking too loud.

But, on behalf of the Law Firm, the only issue which appears important or relevant at the present time, from the perspective of the Law Firm, is how they are going to be addressed in the Eastern District. My position would be, one, in view of the recusal motion being filed, if this Court felt like it did not want to recuse itself, since it involved the Eastern District, I don't see where a panel of the three judges could not hear the case as it pertains to the Law Firm, since it involves more than

Just Mr. Jaques that is before the Court. Before you go forward, we'd at least like to know that.

In terms of going forward on the substantive counts, I have no evidence at the present time that members of the Law Firm, other than Mr. Jaques, in his capacity as, I guess, the Chief Partner, or the Managing Partner of the Law Firm, I don't know if there will be other members of the Firm specifically charged with conduct, but I will address that with Mr. Roebuck prior to any hearing.

(10) So, I give you my suggestion as to the recusal motion, and I give you my position as to the Law Firm.

THE COURT: Okay. Well, I think the way to do this, then, is for me to look at the Motion to Recuse, which I understand was filed yesterday; is that right, Mr. Jamail?

MR. JAMAIL: Yes, Your Honor. It's my understanding — and I know Mr. Roebuck got a copy of it yesterday and I believe we filed it under seal to your office yesterday. I believe that's true.

Is that right, Joel?

MR. ANDROPHY: Yes, they were filed yesterday, I believe under seal, Judge.

THE COURT: Okay.

MR. ANDROPHY: When we sent out our specific motion, we actually put it in the envelope under seal.

THE COURT: Yeah. Now, why file under that seal?

MR. ANDROPHY: Well, I decided to research other local rules throughout the country in federal courts and, as a model federal rule for discipline, it had a confidentiality section about the proceedings being confidential but not the order assessing sanctions. And we sent that to the Court, the model rule provision and that's the basis for our request to seal it.

The circuits are split. I don't have an exact number in either direction, but the model rule specifically (11) provided for confidentiality of the hearing, not the results. As far as case law, I don't have any. I didn't find any.

THE COURT: Okay. All right. But would that carry over to a motion to recuse, also? I mean, that's kind of ancillary to the purpose of the hearing, here.

MR. ANDROPHY: It is my — that's basically — I don't have any authority. I thought it would carry over to the entire proceeding, and that's generally my personal procedure. I think this may be only the second time I've ever done it, or our firm has ever done it, rather, but my first thought is to do it under seal. If the Court wants to unseal it, then that's the Court's prerogative, but I would at least give the Court the option.

THE COURT: Okay. Then, all right, what I'll do is look at the Motion to Recuse, hopefully today, or the first part of next week, and then wait to hear from Mr. Roebuck on what he would like to do.

MR. ROEBUCK: I can probably do that by tomorrow afternoon, Your Honor. I need to make a few phone calls, but I can probably make that determination either by tomorrow or Monday, at the latest.

MR. ANDROPHY: Judge, this is Joe Androphy, again. If the Court — I need to speak with my client, but if the Court were to deny the recusal, I think I have an obligation to attempt to go to the Fifth Circuit. I'm not convinced (12) that, from my reading of the case law, would permit me to prevail in the Fifth Circuit on the issue, but I may have to attempt at least that procedure prior to our hearing. So, I just want the Court to know what my mental process is going through at this point.

THE COURT: Well, now, if we proceed with the hearing next Wednesday, and if I deny your Motion to Recuse, then what are you going to ask me, are you going to ask for a continuance?

MR. ANDROPHY: What my plan is, is to get the Fifth Circuit to ask this Court to stay it pending a resolution by the Fifth Circuit, or if the Court would not want to stay it after the Fifth Circuit's stay had begun, a decision by the Fifth Circuit on the recusal issue.

I'm not saying I'm going to do it, but what I want to let the Court know is that these are my basic thoughts at this point in time.

THE COURT: Okay. I'll —

MR. ANDROPHY: I don't want to do something and not tell you ahead of time.

THE COURT: Okay. I appreciate that. I will try to rule on your Motion to Recuse as soon as possible and, then, if I deny it, you'll have ample opportunity to — well, I don't know how long it would take you to present your mandamus petition to the Fifth Circuit, but I'll give you as much time (13) as I can.

MR. ANDROPHY: We can get it to them the next day, Judge, I think. It's not re-inventing the wheel because, basically, we'll be using a lot of the materials that we've already sent to this Court.

THE COURT: Okay. I'll move as quickly as I can and then I'll wait to hear from Mr. Roebuck as soon as he's made a decision.

Anything else, Mr. Androphy?

MR. ANDROPHY: Judge, one other thing. If we do go forward next Wednesday, the only thing personally that I would ask the Court is, my son's Bar Mitzvah starts next Friday, the 6th, and I take it that we'll probably, with the procedures we've already had, it will be done on Wednesday, but if for some reason the Court wanted to re-set it or continue it later, even under the same six counts, I would ask if I could have permission to have off Friday under these circumstances.

THE COURT: Sure. Just remind me of that. I don't think we'll go beyond Wednesday, but just remind me of your son's Bar Mitzvah.

MR. ANDROPHY: Thanks, Judge.

THE COURT: All right.

MR. ANDROPHY: And, Judge, one other thing, I'm going to arrange to have Steve Peterson call Tom Roebuck, or vice versa, so I can give Tom Roebuck ample discovery of what (14) Steve Peterson would testify to, so that it will be a fair discovery process for him, and not something that he would hear for the first time on the stand. So, I'll make those arrangements.

THE COURT: Okay. He's still here in the courtroom, so he heard what you said.

All right. I'll hang up now, and conclude this hearing.
MR. ANDROPHY: Thank you, Your Honor.
THE COURT: All right. Thank you.

(Proceedings concluded at 9:35 a.m.)

(Certificate of Reporter Omitted)

TRANSCRIPT OF HEARING

(United States District Court —
Eastern District of Texas —
Beaumont Division)

(Proceedings of October 4, 1996)

(IN RE: IN THE MATTER OF: LEONARD C. JAQUES AND THE JAQUES ADMIRALTY LAW FIRM — Civil Docket No. 6:96mc160)

Beaumont, Texas
October 4, 1996 – 3:08 p.m.

BEFORE THE HONORABLE RICHARD A. SCHELL,
UNITED STATES DISTRICT JUDGE

APPEARANCES:
FOR THE COURT: MR. THOMAS P. ROEBUCK,
1240 Orleans, Beaumont, Texas 77701;
FOR LEONARD C. JAQUES: MR. JOEL M. ANDROPHY,
3704 Travis, Houston, Texas 77002.

* * *

(2) October 4, 1996
3:08 p.m.

(Hearing by telephone, in chambers.)

THE COURT: This is *In the Matter of Leonard C. Jaques*, Civil Action No. 6:96mc160.

I need a couple of minutes of your time. Mr. Roebuck has prepared an Amended Order to Show Cause. I directed him to do this in a previous order and he sent a copy to me and, Mr. Androphy, you received a copy?

MR. ANDROPHY: Yes, I did, Your Honor.

THE COURT: I want both of you on the phone because of Mr. Jaques' concern which he has expressed in his mandamus action indicating that I was communicating improperly with Mr. Roebuck, and I want both of

you on the phone. And the only reason for this telephone conference is so that I can tell Mr. Roebuck that I read through the Amended Order to Show Cause and there are just a few changes I would lke to make to the Order which are mostly typographical.

If Mr. Roebuck will send me the computer disc we could make the changes and corrections, I can sign it and get on with this matter.

Is that okay with you, Mr. Roebuck?

MR. ROEBUCK: That would be fine, Judge, except it's on our hard disc.

THE COURT: Well, all right, then, we can send you the changes and you can make them.

MR. ROEBUCK: Okay.

(3) THE COURT: Richard has made the changes and we could send you a copy. They are all cosmetic.

MR. ROEBUCK: I'm not surprised. I was rushing to get this out.

THE COURT: Do you have any objections to that, Mr. Androphy?

MR. ANDROPHY: Judge, I'm not sure. I appreciate the opportunity to be involved in this call. I can't state for the record that I have no objections. I may have an objection to Your Honor changing what Mr. Roebuck proposes. I don't know whether or not this is anything I could attack. I guess at this time I would object to the Court's — for the lack of a better word — interference into what Mr. Roebuck has done. At this point, for the record, I have to object.

THE COURT: Well, this is somewhat a hybrid proceeding. I've appointed Mr. Roebuck to present the evidence in this case and I've initially told him what the case is about, which is necessary. I don't see how it can be done any other way. I also told him that the Show Cause Order should be amended and I left that up to Mr. Roebuck.

I think all that is necessary is that these typos need to be changed before I sign the Order. That's the only purpose for my call. I didn't want to do it in an informal

way because Mr. Jaques seems so concerned that I'm giving Mr. Roebuck some special instructions. When it comes to presenting the evidence, I certainly want him to do it.

(4) MR. ROEBUCK: I want to make the record real clear that this Amended Order was drafted solely and exclusively by me. What I think the Court is talking about is that there are cosmetic changes that need to be made, or typographical errors that need to be corrected. The Court in no way drafted the Order, it's just changes —

(Inaudible because of telephone noise.)

THE COURT: I think we got out of range, or something. Mr. Roebuck, I guess you will have to repeat what you said.

MR. ROEBUCK: Did any of that get on the record, Your Honor?

THE COURT: Well, some of it did.

MR. ANDROPHY: What I picked up is that you're saying that it's more form over substance.

MR. ROEBUCK: Right.

THE COURT: That's exactly right. That's what I'm telling both of you. All I'm requesting is a change in some of the typo's. This has nothing to do with the substance of what Mr. Roebuck has put in the Amended Order.

MR. ROEBUCK: What I think the Court is saying in a very diplomatic way is that I've done a sloppy job of drafting the document.

THE COURT: Well, no. No, the document is fine, but there are some dates that are not right and there are some quotes that I think need to be changed to be more accurate, and (5) they're just quotes from rules, for example, and some of the dates are not accurate. But that's all. And I just simply wanted to arrange some method for changing those before I sign the order, because —

MR. ROEBUCK: What I will do is make sure that when it comes to me that the quotations — that the citations

— comport with whatever the rule or the statute says, and the dates are correct. And, then, that ought to take care of it.

THE COURT: All right. As a matter of fact, what I'll do is I'll ask Mr. Vangelisti to send you the red marked copy, Mr. Roebuck, and I'll ask Mr. Vangelisti to send a photocopy of his changes to Mr. Androphy.

MR. ROEBUCK: Okay. I think that's a good way to do it.

THE COURT: Both sides can see that this is just cosmetic.

All right. That's all I had. Anything else we need to discuss?

MR. ROEBUCK: Not for me, Your Honor.

THE COURT: Thank you for being available.

MR. ANDROPHY: Thank you, Judge.

(Proceedings concluded at 3:15 p.m.)

(Certificate of Reporter Omitted)

EASTERN DISTRICT OF TEXAS LOCAL RULE 3

TEXAS RULES OF COURT — FEDERAL — 1996

INCLUDING AMENDMENTS RECEIVED THROUGH FEBRUARY 1, 1996

* * *

LOCAL COURT RULES OF THE UNITED STATES DISTRICT COURT FOR THE EASTERN DISTRICT OF TEXAS

Effective October 14, 1987

Including Amendments Received Through February 2, 1996

* * *

RULE 3. ATTORNEYS: DISCIPLINE, DISBARMENT

(a)

GENERALLY.

The standards of professional conduct adopted as part of the Rules Governing the State Bar of Texas shall serve as a guide governing the obligations and responsibilities of all attorneys appearing in this Court. It is recognized, however, that no set of rules may be framed which will particularize all the duties of the attorney in the varying phases of litigation or in all the relations of professional life. Therefore, the attorney practicing in this Court should be familiar with the duties and obligations imposed upon members of this Bar by the Texas Disciplinary Rules of Professional Conduct, court decisions, statutes, and the usages, customs and practices of this Bar.

(b)

DISCIPLINARY ACTION INITIATED IN OTHER COURTS.

(1) A member of the bar of this court shall automatically lose his or her membership if he or she loses, either temporarily or permanently, the right to practice law before any state or federal court for any

reason other than nonpayment of dues, failure to meet continuing legal education requirements or voluntary resignation unrelated to a disciplinary proceeding or problem.

(2) When it is shown to the court that a member of its bar has been either disbarred or suspended, the clerk shall enter an order for the court, effective ten days after issuance unless sooner modified or stayed, disbaring or suspending the member from practice in this court upon terms and conditions identical to those set forth in the order of the other court.

(c)

CONVICTION OF A CRIME.

A member of the bar of this court who is convicted of a felony offense in any state or federal court will be immediately and automatically suspended from practice and thereafter disbarred upon final conviction.

(d)

DISCIPLINARY ACTION INITIATED IN THIS COURT.

(1) *Grounds for Disciplinary Action.* This court may, after the member has been given an opportunity to show cause to the contrary, take any appropriate disciplinary action against any member of its Bar:

(A) for conduct unbecoming a member of the Bar;

(B) for failure to comply with these local rules, the court's Civil Justice Expense and Delay Reduction Plan or any other rule or order of this court;

(C) for unethical behavior;

(D) for inability to conduct litigation properly; or

(E) because of conviction by any court of a misdemeanor offense involving dishonesty or false statement.

(2) *Disciplinary Procedures.*

(A) When it is shown to a judge of this court that a member of this bar has engaged in conduct which might warrant disciplinary action, the judge receiving the information shall bring the matter to the attention of the full court as to whether disciplinary proceedings should be held. If the court determines that further disciplinary proceedings are necessary, the court will notify the lawyer of the charges and give the lawyer opportunity to show good cause why he or she should not be suspended or disbarred. Upon the charged lawyer's response to the order to show cause, and after a hearing if requested or upon expiration of the time prescribed for a response if no response is made, the court shall enter an appropriate order.

(B) At any hearing, the charged lawyer shall have the right to counsel and at least fourteen days' notice of the time and charges. Prosecution of the charges may be conducted by an attorney specially appointed by the court. Costs of the prosecutor and any fees allowed by the court shall be paid from the attorney admission fee fund.

(e)

NOTIFICATION OF DISCIPLINARY ACTION.

Upon final disciplinary action by the court, the clerk shall send certified copies of the court's order to the State Bar of Texas, the Fifth U.S. Circuit Court of Appeals and the National Discipline Data Bank operated by the American Bar Association.

(f)

REINSTATEMENT.

Any lawyer who is suspended by this court is automatically reinstated to practice at the end of the period of suspension. Any lawyer who is disbarred by this court may not apply for reinstatement for at least three years from the effective date of his or her disbarment. Petitions for reinstatement shall be sent to the clerk and assigned to the chief judge for a ruling. Petitions for reinstatement must include a full disclosure concerning the attorney's loss of bar membership in this court and any subsequent felony convictions or disciplinary actions that may have occurred in other federal or state courts.

[Amended October 28, 1994.]

LOUISIANA DISTRICT COURT RULE III

WEST'S LOUISIANA RULES OF COURT

UNIFORM LOCAL RULES OF THE
UNITED STATES DISTRICT COURT FOR THE
EASTERN, MIDDLE, AND WESTERN DISTRICTS OF LOUISIANA

APPENDIX—20.10E—RULES OF DISCIPLINARY ENFORCEMENT
OF THE UNITED STATES DISTRICT COURT FOR THE
EASTERN DISTRICT OF LOUISIANA

Current with amendments received through 3-1-96.

* * *

RULE III. PROCEDURES

A.
COMMENCEMENT OF PROCEEDINGS.

1. Disciplinary proceedings under these Rules shall be commenced by (1) the filing of a complaint which sets forth a factual statement of the alleged misconduct; (2) a judgment of conviction; or (3) an order of disbarment, suspension, or other discipline imposed by another court on which the proceedings are based.

2. A certified copy of a judgment of conviction of an attorney for a "serious" crime shall be conclusive evidence of the commission of that crime in any disciplinary proceeding instituted against that attorney based upon the conviction.

3. Complaints involving conviction of an attorney for an offense not constituting a "serious crime" as defined above or allegations or instances of other misconduct by an attorney shall be referred by the judge to whose attention any such complaint has come to the court en banc for determination by a majority of the active judges of the action to be taken, if any, with respect to such complaint.

4. In any case in which the court en banc determines that a complaint or allegations of misconduct, other than the conviction of a "serious crime," even if substantiated, would not warrant disciplining the attorney involved or should be handled by another forum such as the Office of the Disciplinary Counsel for the Louisiana State Bar Association, such complaint may be disposed of by the court without investigation or other action in such manner and with such formality as it deems appropriate.

5. If the complaint is to be pursued, it shall be docketed for random allotment among the active judges of the court. If a matter is predicated upon a complaint by the alloted judge, it shall be reallotted.

6. The allotted judge will conduct all necessary proceedings in such matters.

B.

INVESTIGATION.

1. In disciplinary proceedings based on allegations or instances of misconduct by an attorney other than a criminal confiction for a "serious crime," the allotted judge shall appoint counsel to investigate the matter and to make a report thereon in accordance with the provisions of paragraph (6) hereinafter. The order of appointment shall set forth the alleged misconduct to be investigated.

2. A copy of the order of appointment for investigation, together with a copy of the complaint or judgment of conviction involved, shall be mailed to the respondent-attorney via registered or certified mail, return receipt requested.

3. The term "counsel" as used in these Rules shall refer to the United States Attorney, his/her assistants, and any other member or members of the bar of this court who are appointed to conduct investigations in and/or to institute and prosecute any disciplinary pro-

ceedings provided for in these Rules. Counsel appointed pursuant to these Rules shall serve until relieved by the court.

4. Substitute counsel may be appointed when deemed proper by the court. Whenever it appears that any investigatory or prosecuting counsel is then engaged as an adversary of the respondent-attorney in any other matter, the court shall make a substitute appointment.

5. Upon application by appointed counsel, or counsel for the repondent-attorney, the allotted judge may direct the clerk to issue subpoenas and subpoenas duces tecum as may be required in any investigation or proceeding.

6. Counsel shall expedite the investigation and shall deliver a report thereon in writing to the allotted judge. Counsel may include in the report a recommendation for or against institution of disciplinary action and shall give reasons therefor. The court shall not be required to act in accordance with any such recommendation.

C.

IMPOSITION OF DISCIPLINE.

1. If after reviewing counsel's report, the court concludes that disciplinary action may be warranted, the respondent-attorney shall be ordered to show cause within 30 days after service of the order to show cause, or at such other designated time, why he/she should not be disbarred or suspended or other discipline imposed. The order to show cause shall be served upon the respondent-attorney by personal service or by registered or certified mail, return receipt requested, along with a copy of the document(s) upon which the disciplinary proceedings are based, i.e., the complaint, the judgment of conviction, or the disciplinary order or judgment of another court, as the case may be.

2. The respondent-attorney shall file a written response within the prescribed time, either admitting or

denying the alleged misconduct, conviction, order of disbarment, or suspension or other discipline imposed by another court, together with whatever matters he/she wishes to assert in defense.

3. If any issue of fact is raised by the respondent-attorney's response or if he/she wishes to be heard in mitigation, the matter shall be set for hearing before the allotted judge.

4. For respondent-attorney's failure to file a timely response, the allotted judge may enter an order disbarring or suspending him/her from practice for such failure.

D.

FINAL DETERMINATION.

1. The allotted judge shall conduct the hearings and all other necessary proceedings in disciplinary actions and shall make written findings and recommendations to be submitted to the court en banc for its consideration and determination of the final discipline, if any, to be taken.

2. The court's decision shall be evidenced by an order signed for the court by the allotted judge or other such judge of the court as may be designated by the Chief Judge.

3. Whenever suspension from practice is ordered as final discipline, the order shall fix the time when an application for reinstatement may be filed.

E.

DISCIPLINARY PROCEEDINGS AGAINST ATTORNEYS CONVICTED OF "SERIOUS" CRIMES.

1. Upon the filing with this court of a certified copy of the judgment of conviction of an attorney convicted of a "serious crime," as defined above, the court shall enter an order suspending the convicted attorney,

whether such conviction resulted from a plea or guilty or nolo contendere or from a verdict after trial or otherwise, regardless of any pending appeals.

2. Once all appeals from the conviction are concluded, a majority of the active judges will determine, en banc, the final discipline to be imposed in the disciplinary proceeding based on the conviction.

F.

REINSTATEMENT UPON REVERSAL OF CONVICTION.

1. An attorney suspended under these Rules shall be reinstated immediately upon the filing of evidence that the underlying conviction has been reversed. However, lifting of the suspension will not terminate any disciplonary proceedings then pending against the attorney, the disposition of which shall be determined on the basis of all available evidence pertaining to the conduct which was the basis of the criminal prosecution, all in accordance with these Rules. In the event of such reversal, the court may appoint counsel to assimilate and report to the court the evidence pertaining to the conduct which was the basis of the criminal prosecution. The investigation and disposition of the alleged misconduct will proceed in accordance with Sections (B), (C), and (D) of this Rule.

G.

DISCIPLINARY ACTION BY OTHER COURTS.

1. Any attorney admitted to practice before this court shall, upon being subjected to public discipline by any other court of the United States or the District of Columbia, or by a court of any state, territory, commonwealth, or possession of the United States, promptly inform the clerk of this court of such action.

2. Upon the filing of a certified or exemplified copy of a judgment or order evidencing the fact that the said attorney has been disciplined by another court, a disci-

plinary proceeding shall be commenced and shall proceed to finality as provided in Sections (A) through (E) of this Rule.

3. In the event the discipline imposed in the other jurisdiction has been stayed there, any reciprocal discipline imposed in this court shall be deferred until such stay expires.

4. After due proceedings had, this court shall impose such discipline as the circumstances warrant, unless the respondent-attorney demonstrates, and this court finds, that upon the face of the record upon which the discipline in another jurisdiction is predicated, it clearly appears that:

a. The attorney was deprived of due process by the lack of proper notice or the opportunity to be heard; or

b. There was such an infirmity of truth establishing the misconduct as to give rise to the clear conviction that this court could not, consistent with its duty, accept as final the conclusion on that subject.

5. In all other respects, a final adjudication in another court that an attorney has been guilty of misconduct shall establish conclusively the misconduct for purposes of a disciplinary proceeding in this court.

H.

PAYMENT OF FEES AND COSTS.

1. On completion of his/her services in any disciplinary or other matter under these Rules, court-appointed counsel may make application to this court for an order awarding reasonable fees and reimbursing reasonable and necessary costs and expenses. The court, in fixing the compensation to be awarded, shall apply the in-court and out-of-court hourly rates prescribed in 18 U.S.C. § 3006A(d)(1) for determining the

compensation of counsel appointed pursuant to Criminal Justice Act (18 U.S.C. § 3006A) to represent indigent defendants.

2. The cost and expense of any disciplinary proceeding, including counsel's fees as determined by the court, may be assessed to and shall be paid by the respondent-attorney.

I.

NOTIFICATION TO CLIENTS AND CLERK.

1. Within 21 days from the date on which an order or judgment of suspension or disbarment has become final and within a like period from the date of a notice given to assume inactive status pursuant to the providions of Rule VII(G), the attorney so suspended or disbarred or assuming inactive status shall notify by registered or certified mail, return receipt requested, all clients to whom he/she is responsible for pending matters before this court of the fact that he/she cannot continue to represent them.

2. Within 45 days from the date on which any such order or judgment of suspension or disbarment has become final and within a like period from the date of a notice given to assume inactive status, the attorney shall file with the clerk of this court an affidavit stating that he/she has fully complied with the provisions of Rule III(1)(1) above. The affidavit shall also indicate his/her compliance with this Rule so that proof of compliance will be available if needed for any subsequent proceeding instituted by or against him/her.

J.

SERVICE BY MAIL.

1. Whenever service of any pleading, order, notice, or other paper upon any respondent-attorney is directed or authorized by these Rules to be made by registered or certified mail, return receipt requested, such service

shall be deemed to have been made if the mail is addressed to the respondent-attorney at his/her most recent address appearing in the Roll of Attorneys.

2. Service of any pleading, order, notice, or other paper not required to be served by registered or certified mail may be deemed to have been made when same is addressed and mailed, via ordinary mail, to the respondent-attorney at his/her most recent address appearing in the Roll of Attorneys or in the most recent pleading or other document filed in the disciplinary proceedings by a respondent-attorney appearing pro se.

3. Service of any pleading, order, notice, or other paper may be made upon counsel or respondent's attorney by mailing same to him/her at his/her address appearing in the most recent pleading or other document filed by either in the disciplinary proceedings.

4. Whenever used in these Rules, "Roll of Attorneys" refers to the Roll of Attorneys admitted or otherwise authorized to practice in this court.

K.
CONFIDENTIALITY.

1. Complaints of misconduct, disciplinary proceedings, and the records therein, except orders of disbarment, suspension, reprimand, or other disciplinary sanctions, shall not be made public except on order of the court.

2. To preserve confidentiality, all proceedings shall be heard in chambers, unless respondent-attorney requests a hearing in open court.

Adopted effective May 15, 1989; amended January 16, 1996.

U.S. Dist. Ct. Rules E.D. La., Disciplinary Rule 3

LOUISIANA DISTRICT COURT RULE XX

WEST'S LOUISIANA RULES OF COURT

UNIFORM LOCAL RULES OF THE
UNITED STATES DISTRICT COURT FOR THE
EASTERN, MIDDLE, AND WESTERN DISTRICTS OF LOUISIANA

Current with amendments received through 3-1-96.

RULE 20. ATTORNEYS

20.01 E & W
ROLL OF ATTORNEYS.

The bar of the court consists of those lawyers admitted to practice before the court who have taken the prescribed oath and signed the roll of attorneys for the district.

20.01 M
ROLL OF ATTORNEYS.

The bar of this court consists of those lawyers admitted to practice before this court who have taken the prescribed oath.

20.02
ELIGIBILITY.

Any member in good standing of the bar of the Supreme Court of Louisiana is eligible for admission to the bar of these courts.

20.03 E
PROCEDURE FOR ADMISSION.

A. Each applicant for admission to the bar of this court shall file with the clerk a written petition signed by him or her and endorsed by two members of the bar of this court listing the applicant's residence and office address, his or her general and legal education, the courts that have admitted him or her to practice, and

stating that the applicant is qualified to practice before this court, is of good moral character, and is not subject to any pending disbarment or professional discipline procedure in any other court. If the applicant has previously been subject to any disciplinary proceedings, full information about the proceedings, the charges and the result will be given.

B. The petitioner may then be admitted in open court or in chambers, and upon taking an oath to conduct himself or herself as an attorney or counselor of this court uprightly and according to law and to support the Constitution of the United States. He or she shall then, under the direction of the clerk, sign the roll of attorneys and pay the fee required by law and any other fee required by the court. Unless such a motion for admission is made within six months of the filing of the petition, the clerk may destroy the petition and a new petition will be necessary before the applicant can be admitted.

20.03 M
PROCEDURE FOR ADMISSION.

A. Each applicant for admission to the bar of this court shall file with the clerk a written petition signed by him or her and endorsed by two members of the bar of this court listing the applicant's residence and office address, his or her general and legal education, the courts that have admitted him or her to practice, and stating that the applicant is qualified to practice before this court, is of good moral character, and is not subject to any pending disbarment or professional discipline procedure in any other court. If the applicant has previously been subject to any disciplinary proceedings, full information about the proceedings, the charges and the result will be given.

B. The petitioner may then be admitted in open court, or in chambers or by mail, and upon taking an oath to conduct himself or herself as an attorney or

counselor of this court uprightly and according to law and to support the Constitution of the United States. He or she shall then, under the direction of the clerk, pay the fee required by law and any other fee required by the court. Unless such a motion for admission is made within six months of the filing of the petition, the clerk may destroy the petition and a new petition will be necessary before the applicant can be admitted.

20.03 W

PROCEDURE FOR ADMISSION.

A. Each applicant for admission to the bar of this court shall file with the clerk a written petition signed by him or her and endorsed by two members of the bar of this court listing the applicant's residence and office address, his or her general and legal education, the courts that have admitted him or her to practice, and stating that the applicant is qualified to practice before this court, is of good moral character, and is not subject to any pending disbarment or professional discipline procedure in any other court. If the applicant has previously been subject to any disciplinary proceedings, full information about the proceedings, the charges and the result will be given.

B. The petitioner may then be admitted in open court, in chambers or by mail, and upon taking an oath to conduct himself or herself as an attorney or counselor of this court uprightly and according to law and to support the Constitution of the United States. He or she shall then, under the direction of the clerk, pay the fee required by law and any other fee required by the court. Unless such a motion for admission is made within six months of the filing of the petition, the clerk may destroy the petition and a new petition will be necessary before the applicant can be admitted.

20.04 E
RULES OF CONDUCT.

This court hereby adopts the Rules of Professional Conduct of the Louisiana State Bar Association, as hereafter may be amended from time to time by the Louisiana Supreme Court, except as otherwise provided by a specific rule or general order of a court.

20.04 M
RULES OF CONDUCT.

Except as otherwise provided by a specific rule of the court, the Rules of Professional Conduct of the Louisiana State Bar Association promulgated by the Louisiana Supreme Court and in effect on May 15, 1989 are hereby adopted by this court. Subsequently promulgated, or other rules of professional conduct may be adopted by this court by general order.

20.04 W
RULES OF CONDUCT.

This court hereby adopts the Rules of Professional Conduct of the Louisiana State Bar Association, as hereafter may be amended from time to time by the Louisiana Supreme Court, except as otherwise provided by a specific rule of the courts.

20.05
ATTORNEY REPRESENTATION.

In all cases before this court, any party who does not appear in proper person must be represented by a member of the bar of this court, except as set forth below.

20.06
VISITING ATTORNEYS.

Any member in good standing of the bar of any court of the United States or of the highest court of any state

and who is ineligible to become a member of the bar of this court, may, upon written motion of counsel of record who is a member of the bar of this court, by ex parte order, be permitted to appear and participate as co-counsel in a particular case.

The motion must have attached to it a certificate by the presiding judge or clerk of the highest court of the state, or court of the United States, where he or she has been so admitted to practice, showing that the applicant attorney has been so admitted in such court, and that he or she is in good standing therein.

The applicant attorney shall state under oath whether any disciplinary proceedings or criminal charges have been instituted against him or her, and if so, shall disclose full information about the proceedings or charges and the results thereof.

An attorney thus permitted to appear may participate in a particular action or proceeding in all respects, except that all documents requiring signature of counsel for a party may not be signed solely by such attorney, but must bear the signature also of local counsel with whom he is associated.

Local counsel shall be responsible to the court at all stages of the proceedings.

Designation of the visiting attorney as "Trial Attorney" pursuant to Rule 1.04 herein shall not relieve the local counsel of the responsibilities imposed by this rule.

20.07

WAIVER BY COURT ORDER
OF REQUIREMENTS FOR LOCAL COUNSEL.

In any civil action, a counsel who is ineligible to become a member of the bar of this court under Rule 20.02, may be authorized by court order to appear and act for any party without joinder of local co-counsel when it is shown that:

A. The party would suffer hardship by joinder of local counsel; and

B. The obligations and duties of counsel in the particular litigation will be fulfilled.

20.08

FAMILIARITY WITH AND COMPLIANCE WITH RULES.

Everyone who appears in court in proper person and every attorney permitted to practice in this court shall be familiar with these rules. Willful failure to comply with any of them, or a false certificate of compliance, shall be cause for such disciplinary action as the court may see fit, after notice and hearing.

20.08.1 E

FAMILIARITY WITH THE RECORD.

Counsel for a party in any civil matter in this court shall be familiar with the substance of all documents filed in the case and if the case is consolidated with one or more other cases, shall be familiar with the record of the consolidated cases. It is the responsibility of counsel representing a party joined in a case after its inception whether by third party complaint or otherwise, or whose case is consolidated with one or more pending cases, to become familiar with court orders and with other documents previously filed in the record.

20.09 E

COUNSEL'S FAILURE TO APPEAR.

Counsel's failure to appear, or appearing only extremely late, for conferences with the court or its magistrate judges, or for the argument of motions, trial, or any other proceeding, causes great inconvenience to the court, opposing counsel, and, in some instances, to witnesses and jurors. Accordingly, it will be the court's policy to impose costs or sanctions as follows:

A. For failure to appear, or appearing extremely late, at any proceeding before any of the judges or magistrate judges when the lawyer has been given timely notice of the conference or hearing, has failed in advance to seek a continuance, and has no adequate excuse:

1. If this is the first time counsel has been delinquent, or if the last time he/she failed to appear promptly was more than two years ago, he/she shall be ordered to pay a fee in a reasonable amount to each opposing counsel who has appeared.

2. If this is the second time, and it is within two years of the first, the lawyer will be required to pay a fee in a reasonable amount to each opposing counsel who has appeared, and will, in addition, be cited to show cause before a judge of this court why he or she should not be suspended from practice for a period of time or subjected to some other form of disciplinary action.

3. The fee is not to be waived, nor is it to be returned or taken into account on settlement. It is not to be billed or charged to a client in any way.

B. For failure without adequate excuse to appear for a trial or a hearing for which witnesses have been summoned, or for unreasonable delay in appearing at such times, the lawyer will be required to show cause why he or she should not be subject to disciplinary action by the court.

20.10 E

PUBLISHER'S NOTE.

See "Appendix–20.10E–Rules of Disciplinary Enforcement of the United States District Court for the Eastern District of Louisiana."

20.10 M
SUSPENSION AND DISBARMENT.

Any person admitted to practice before the court shall give written notice to the clerk of:

1. His/her disbarment or suspension by any court or bar association; and
2. His/her conviction of any felony.

Pending any appeal of the conviction, suspension or disbarment, a member of the bar may be suspended from further practice before this court.

Any member of the bar of this court may be disbarred or otherwise disciplined after such hearing as the court may in each particular instance direct, but any member of this bar who has been disbarred or dropped, or hereater may be disbarred or dropped, from the Bar of the State of Louisiana, or any other state or country, or from the bar of any court of the United States, shall be dropped from the bar of this court and his/her name stricken from the roll.

20.10 W
ATTORNEY DISCIPLINE [*Repealed*].

20.101 E
PRACTICING BEFORE ADMISSION OR DURING SUSPENSION.

Any person who exercised in any proceeding in this court any of the privileges of a member of the bar or who pretends to be entitled to do so before his or her admission to the bar of this court, or during his or her disbarment or suspension, is in contempt of court and subjects himself or herself to disciplinary action.

20.11
CONTINUING REPRESENTATION, WITHDRAWALS, SUBSTITUTION OF COUNSEL.

The original counsel of record shall be held to represent the party for whom he or she appears unless the

court permits him or her to withdraw from the case. He or she may obtain permission only upon joint motion to substitute counsel or upon a written motion served on opposing counsel and the client before the court acts. If other counsel is not thereby substituted, the motion to withdraw shall contain the present address of the client and the client's telephone number if the client can be reached by telephone. The motion shall be accompanied by a certificate of service, including a statement that the client has been notified of all deadlines and pending court appearances, on both the client by certified mail and opposing counsel, or an affidavit stating why service has not been made.

20.12
ADDITIONAL COUNSEL.

Where counsel has appeared for any party, other counsel may appear for the same party only:

A. Upon motion of counsel of record for that party, or motion consented to by him/her; or

B. Upon motion, after counsel for the party has been permitted to withdraw or has died, or is incapacitated, or cannot be found; or

C. Upon motion of a party after notice to counsel of record and a hearing thereon.

20.13
APPEARANCES BY LAW STUDENTS.

Limited appearances by law students, if the person on whose behalf he or she is appearing has consented to that appearance in writing and the supervising lawyer has also approved the appearance in writing, are allowed in any civil matter in which a fee is not provided for or could not reasonably be anticipated; and in a criminal matter on behalf of an indigent defendant.

An eligible law student may also appear in any criminal matter on behalf of the United States with the

written approval of both the prosecuting attorney or his or her authorized representative and the supervising lawyer. Insofar as practicable, the legal services of law students in criminal practice shall be divided equally between prosecution and defense.

The written consent and approval referred to above shall be filed in the record of the case and shall be brought to the attention of the judge.

The supervising lawyer or the prosecuting attorney must personally be present throughout the proceedings and shall be responsible for the manner in which they are conducted.

A.

Prerequisites to Law Student Appearances.

In order to make an appearance pursuant to this rule, the law student must:

1. Be duly enrolled in a law school in this state approved by the American Bar Association;
2. Have completed four (4) full-time semesters of legal studies or the equivalent if the school is on some basis other than a semester basis;
3. Be certified by the dean of his or her law school as being of good moral character, competent legal ability, and adequately trained to perform as a legal intern;
4. Be introduced to the court by an attorney admitted to practice in this court;
5. Neither ask for nor receive remuneration of any kind for services;
6. Take the following oath:

   "I, ____, do solemnly swear that I will support the Constitution of the United States and of the State of Louisiana and have read and am familiar

with the Code of Professional Responsibility of the Louisiana State Bar Association, and I understand that I am bound by the precepts therein contained as fully as if I were admitted to the practice of law in Louisiana; and that I further accept the privileges granted to me as well as the responsibilities which will devolve upon me, so that I may be more useful through my clinical education in the service of justice."

B.

Certification of Students.

The certification of a student by the law school dean:

1. Shall be filed with the clerk and, unless sooner withdrawn, it shall remain in effect for twelve (12) months after it is filed, or until the announcement of the results of the first bar examination following the student's graduation, whichever comes earlier. For any student who passes that examination or who is admitted to the bar without taking an examination, the certification shall continue in effect until the date he or she is admitted to the bar;

2. May be withdrawn by the dean at any time by mailing a notice to that effect to the clerk. The notice need not state the cause for withdrawal;

3. May be terminated by this court at any time without notice or hearing and without any showing of cause. Notice of the termination may be filed with the clerk.

C.

Supervision of Students.

The member of the bar under whose supervision an eligible law student works shall:

1. Be admitted to practice before this court, and be approved by the dean of the law school in which

the law student is enrolled for service as a supervising lawyer for this program;

2. Assume personal professional responsibility and liability for the student's guidance in any work undertaken and for supervising the quality of the student's work;

3. Assist the student in his or her preparation.

20.14
VACANT.

20.15
VACANT.

20.16
AWARD OF ATTORNEY'S FEES.

In all cases where attorney's fees are sought, the party desiring to be awarded such fees shall submit to the court a contemporaneous time report reflecting the date, time involved, and nature of the services performed. The report shall be in both narrative and statistical form and provide hours spent and justification thereof.

Any judge of the court may, for good cause shown, relieve counsel of the obligation of filing such a report with the court.

20.17 M & W
COURTROOM DECORUM.

The purpose of this rule is to emphasize, not to supplant, certain portions of those ethical principles applicable to the lawyer's conduct in the courtroom. In addition to the other requirements, therefore, lawyers appearing in this court shall:

1. Stand as court is opened, recessed or adjourned.

2. Stand when the jury enters or retires from the courtroom.

3. Stand when addressing, or being addressed by, the court.

4. Stand at the lectern while examining any witness; except that counsel may approach the clerk's desk or the witness for purposes of handling or tendering exhibits.

5. Stand at the lectern while making opening statements or closing arguments.

6. Address all remarks to the court, not to opposing counsel.

7. Avoid disparaging personal remarks or acrimony toward opposing counsel and remain wholly detached from any ill feeling between the litigants or witnesses.

8. Refer to all persons, including witnesses, other counsel and the parties by their surnames and not by their first or given names.

9. Only one attorney for each party shall examine, or cross examine, each witness.

10. Counsel should request permission before approaching the bench; and any documents counsel wish to have the court examine should be handed to the clerk.

11. Any paper or exhibit not previously marked for identification should first be handed to the clerk to be marked before it is tendered to a witness for his examination; and any exhibit offered in evidence should, at the time of such offer, be handed to opposing counsel.

12. In making objections counsel should state only the legal grounds for the objection and should withhold all further comment or argument unless elaboration is requested by the court.

13. In examining a witness counsel shall not repeat or echo the answer given by the witness.

14. Offers of, or requests for, a stipulation should be made privately, not within hearing of the jury.

15. In opening statements and in arguments to the jury, counsel shall not express personal knowledge or opinion concerning any matter in issue; shall not read or purport to read from deposition or trial transcripts, and shall not suggest to the jury, directly or indirectly, that it may or should request transcripts or the reading of any testimony by the reporter.

16. Counsel shall admonish all persons at counsel table that gestures, facial expressions, audible comments, or the like, as manifestations of approval or disapproval during the testimony of witnesses, or at any other time, are absolutely prohibited.

Adopted effective May 15, 1989; amended effective August 19, 1991; October 1, 1992; amended May 3, 1993; amended effective November 30, 1993; amended October 31, 1995.

Uniform U.S. Dist. Ct. Rules D. La., Rule 20

UNITED STATES DISTRICT COURT LOCAL RULES OF DISCIPLINARY PROCEEDINGS

State District	Total Districts	Investigating Counsel Appointed Before Formal Charges Brought	Mandatory Referral to Impartial Judge/Panel of Judges	Disciplinary Committee/Committee on Conduct	Referred to State Bar Committee on Discipline	No Provisions in Rules
Model Federal Rules of Disciplinary Enforcement		✓	✓			
1 Alabama	3					
Northern		✓	✓			
Middle						
Southern						✓
2 Alaska	1					✓
3 Arizona	1					✓
4 Arkansas	2					✓
Eastern		✓	✓			
Western		✓	✓			
5 California	4					
Northern			✓	✓		
Eastern						
Central						
Southern			✓	✓		
6 Colorado	1	✓				
7 Connecticut	1	✓	✓	✓		
8 Delaware	1	✓	✓			
9 Dist. of Col.	1		✓			

State District	Total Districts	Investigating Counsel Appointed Before Formal Charges Brought	Mandatory Referral to Impartial Judge/Panel of Judges	Disciplinary Committee/Committee on Conduct	Referred to State Bar Committee on Discipline	No Provisions in Rules
10 Florida	3					
Northern						
Middle		✓	✓			
Southern		✓	✓			
11 Georgia	3					
Northern		✓	✓	✓		
Middle		✓	✓	✓		
Southern						✓
12 Hawaii	1	✓		✓		
13 Idaho	1					✓
14 Illinois	3					
Northern			✓	✓		
Central						✓
Southern		✓	✓			
15 Indiana	2					
Northern		✓	✓			
Southern		✓	✓			
16 Iowa	2					
Northern						✓
Southern						✓

State District	Total Districts	Investigating Counsel Appointed Before Formal Charges Brought	Mandatory Referral to Impartial Judge/Panel of Judges	Disciplinary Committee/Committee on Conduct	Referred to State Bar Committee on Discipline	No Provisions in Rules
17 Kansas	1	✓		✓		
18 Kentucky	2					
Eastern						✓
Western						✓
19 Louisiana	3					
Eastern		✓	✓			
Middle						✓
Western						✓
20 Maine	1	✓	✓			
21 Maryland	1		✓	✓		
22 Massachusetts	1	✓	✓			
23 Michigan	2					
Eastern						✓
Western						
24 Minnesota	1	✓	✓			
25 Mississippi	2					
Northern						
Southern					✓	
26 Missouri	2					
Eastern						

State District	Total Districts	Investigating Counsel Appointed Before Formal Charges Brought	Mandatory Referral to Impartial Judge/Panel of Judges	Disciplinary Committee/Committee on Conduct	Referred to State Bar Committee on Discipline	No Provisions in Rules
Western		✓	✓			
27 Montana	1					✓
28 Nebraska	1	✓	✓			
29 Nevada	1					
30 N. Hampshire	1	✓	✓			
31 New Jersey	1	✓			*(Discretionary)*	
32 New Mexico	1					
33 New York	4					
Northern			✓			
Southern						
Eastern						
Western						
34 N. Carolina	3					
Eastern						
Middle		✓			*(Discretionary)*	
Western						
35 N. Dakota	1					✓
36 Ohio	2					
Northern						✓
Southern		✓	✓			

State District	Total Districts	Investigating Counsel Appointed Before Formal Charges Brought	Mandatory Referral to Impartial Judge/Panel of Judges	Disciplinary Committee/Committee on Conduct	Referred to State Bar Committee on Discipline	No Provisions in Rules
37 Oklahoma	3					
Northern						
Eastern						
Western		✓	✓	(Discretionary)		
38 Oregon	1		✓	✓		
39 Pennsylvania	3					
Eastern		✓	✓			
Middle			✓			
Western		✓	✓			
40 Puerto Rico	1					
41 Rhode Island	1					
42 S. Carolina	1	✓	✓			
43 S. Dakota	1		✓		(Discretionary)	
44 Tennessee	3					
Eastern						
Middle					(Discretionary)	
Western				(Discretionary)		
45 Texas	4					✓
Northern						
Southern		✓	✓			✓

State District	Total Districts	Investigating Counsel Appointed Before Formal Charges Brought	Mandatory Referral to Impartial Judge/Panel of Judges	Disciplinary Committee/Committee on Conduct	Referred to State Bar Committee on Discipline	No Provisions in Rules
Eastern						✓
Western		✓				
46 Utah	1		✓			
47 Vermont	1	✓	✓			
48 Virginia	2					
Eastern		✓	✓			
Western		✓	✓	✓		
49 Washington	2					
Eastern			✓			
Western		✓				
50 W. Virginia	2					
Northern						
Southern		✓	✓			
51 Wisconsin	2					✓
Eastern						
Western						
52 Wyoming	1	✓	✓			
TOTALS	91	37	43	13	5	21

NOTE: SOME DISTRICT COURT LOCAL RULES WERE NOT ACCESSIBLE AT THE TIME THIS INFORMATION WAS COMPILED.

TESTIMONY OF GEOFFREY HAZARD

(United States District Court —
Eastern District of Texas —
Beaumont Division)

(Proceedings of November 12, 1996)

(IN RE: IN THE MATTER OF: LEONARD C. JAQUES AND THE JAQUES ADMIRALTY LAW FIRM — Civil Docket No. 6:96mc160)

* * *

(4) * * * THE COURT: Okay. Mr. Hazard, if you will just come right over here and raise your right hand and the clerk will swear you in.

GEOFFREY HAZARD, RESPONDENT'S WITNESS, SWORN

THE COURT: Thank you.

THE WITNESS: Good afternoon, Your Honor.

THE COURT: Good afternoon.

Okay. Mr. Androphy, I don't know, maybe in Houston you do it differently. We always conduct the examination from the podium. Do they not do it that way in federal court in Houston?

MR. ANDROPHY: All nine different courts do things nine different ways.

THE COURT: Different. Okay.

MR. ANDROPHY: And some of them actually do it different ways in the same court.

THE COURT: All right.

(5) *Direct Examination*

BY MR. ANDROPHY:

Q. Can you please state your name for the record?

A. Geoffrey C. Hazard, Jr.

Q. And, Professor Hazard, how are you presently employed?

A. I have three employments. I am Trustee Professor of Law at the University of Pennsylvania. I am Director, a title that means Executive Director, of the American Law Institute, which is headquartered in Philadelphia; and I do a consulting practice in the fields of civil litigation and professional responsibility and ethics.

Q. And with regard to the American Law Institute, what are your duties and responsibilities?

A. I'm the chief paid consultant; I give direction to the projects that are presently ongoing; I do planning for the future; I supervise the staff.

Q. What does the American Law Institute do?

A. It's a voluntary organization of lawyers, judges and law professors committed to improvement of the law through the restatements, which are one of our principal projects, and through model legislation, for example, the Uniform Commercial Code, which we do with the National Conference of Commissioners on uniform state laws, the model penal code. We're presently working on a project on family law of a statutory kind.

(6) Q. Are you a member of any other associations that have any responsibilities with regard to the Civil Rules?

A. Yes. I am presently a member of the Rules Committee of the Judicial Conference of the United States. I have just been reappointed to that responsibility. I've also — have been in the past, I'm not now, a member of the section of litigation of the American Bar Association.

Q. With regard to your involvement with the Civil Rules, what specifically do you do?

A. Well, the Rule's Committee is charged with supervising and coordinating the work of rules committees in the fields of the Civil Rules, Criminal Rules, Bankruptcy, Admiralty and Appellate Rules. And our Committee therefore receives recommendations from them, deliberates upon them, makes recommendations concerning one's amendments that it thinks suitable, and forwards them to the Judicial conference. The Judicial Confer-

ence has authority to promulgate the changes or modify them or refuse to do so.

Q. Now, how long have you been involved in that capacity with regard to the rules of procedure?

A. Well, in that capacity, I have served now a three-year term and I'm getting ready to serve another three-year term.

Q. Do you have any involvement with the American Bar Association?

A. Yes. Presently I'm an active member. In the past, I've (7) had — I've been a member of the committee on professional discipline which was responsible for the promulgation of the ABA Model Standards of Professional Discipline now in effect, now adopted in many jurisdictions and looked to in most all of them for guidance.

I was the reporter for the Rules of Professional Conduct that, with important modifications, have since been adopted in Texas and a good many other states, including Pennsylvania and Connecticut, where I am a member of the Bar.

I was the draftsman for the Code of Judicial Decision Conduct, which, with some modifications, is 28 U.S.C., Section 455, and is also a set of rules that's been adopted in most states.

I was a consultant on the Code of Professional Responsibility which was promulgated by the ABA in '70 and which was the predecessor of the Model Rules of Professional Conduct.

Q. With regard to all of your committee work, what do you do, in terms of drafting, for example, going back to the ABA Model Standard Rules, what is your function in serving on an ABA committee in that regard?

A. Well, it depends on what role I play. On the Code of Judicial Conduct, Wayne Thoud (phonetic), who used to teach at The University of Texas, was the reporter and chief (8) researcher, I was the draftsman, neither of us voted, both of us made recommendations which the committee considered, but one has substantial influence in putting the rules together.

On the Rules of Professional Conduct, I was the reporter. One doesn't vote but a reporter, in my opinion, is supposed to give strong advice and to hold the pencil, so to speak, and to translate the Committee's deliberations into texts, and I did that.

Q. What is a reporter?

A. It's a — sometimes it's derived from the French term "rapporteur," it means chief cook and bottle washer, is what it means, as far as the drafting task is concerned. You put into paper, into texts, the ideas that a committee is seeking to express, inevitably in somewhat dissonant terms, and you have to come up with a written formulation that made sense; and the task of the reporter, therefore, is a translator, thinker, critic and servant.

Q. What is involved in drafting, for example, the Rules of Professional Conduct or Model Rules of the ABA? What is involved as either reporter or participant in the Committee, with regard to setting forth an established group of standards?

A. Well, in the case of both the Judicial Code and the Code of — the Rules of Professional Conduct, the code, the (9) Judicial Code, I think, took about three years and the Rules of Professional Conduct took five years of my involvement. There were meetings every four months, approximately, of two days of intense discussion with people who, in my opinion, were very well-informed, very thoughtful, very experienced practitioners, some of them were judges and some academics, but they were people from all over the country.

And then you publish a draft and, in the case of the model rules, you elicit critical comment from all quarters and do a revision, which we did, and then, one, we submitted that to the house of delegates, where it was further criticized and subject to some revision.

So it's a complicated dialog, seeking to reduce to coherent writing, standards that find general acceptance in the relevant community here in the legal profession.

Q. When you say "seek criticism," are the rules in a preliminary state sent out to various members of the Bar and judges to evaluate?

A. Yep, yep; and you get mail back and you read it and take your flogging and go back to revision.

A reporter has an — it's a very serious responsibility to pay close heed to criticism; and if it's cogent, you have to make modifications accordingly.

Q. With regard to the criticism or the comments you may have when drafting the rules, are the rules sent out to the (10) 50 states of the United States, in terms of general councils for the various bars to respond to?

A. Well, in the case of the Rules of Professional Conduct and also the Code of Judicial Conduct, the ABA had public meetings and critical sessions of the kind I described.

They then promulgated them and said to the states and to the national government, in the case of the Judicial Code, "Please adopt. This is our recommendation."

In the course — no state is required to do that. The ABA is just a voluntary organization.

But in the course of the implementation, a number of jurisdictions made various changes. Texas made substantial changes in several of the provisions. Connecticut, where I was a member of the Bar, made very few. Pennsylvania made a few. New York decided not to adopt the rules as such, but appropriated a whole bunch of sections from those model rules in to their existing body of professional rules; and the same thing has happened in New York also happened in California.

So the reaction varied but I think the model rules have been adopted in substantial part in close to 40 jurisdictions including Texas, and then also many federal courts either adopted them directly or when the states — a state adopted those rules, the federal courts, acting under their local rule-making power, then incorporate the new (11) state rules, much as was done here — that is, as said, refers here to Texas rules, that's of —

the references in different districts are cast in different terms. Here it says they shall serve as guidelines. In many districts, what they do is, they say "the rules of state acts," whatever state they're in are the rules of this Court.

So it's a little stronger, it is quite stronger. It's a legally effective adoption. And sometimes, you'll find modifications in the course of doing that, where they think that some of the provision in the rules were not rigorous enough or were not properly conceived.

Q. Do the ABA Rules form — my understanding then is, the ABA Rules are sort of form the framework from which State Bar Rules are implemented and then, following that, Federal Local Rules are implemented?

A. That's a way of putting it. I think that is a correct description of how it has evolved. Legally the ABA has no authority. It has persuasive authority, if you do a good job. It's certainly a prestigious sponsorship. If the technical work is good, states have felt, I'm glad to say, that they were good models to adopt; and the same general reception has been received in the federal courts.

So you're always working on the inherent persuasive quality of the work that you do. That's the same is true of the ALI's restatements, we don't have any legal authority.

(12) Q. I'm going to come back to, Professor Hazard, in a minute, the reference in the Local Rule 3 language, to the fact that the State Bar Rules serve as a guide and that one should be familiar with them. But let me ask you a couple of questions first and then I want to revisit it.

You testified that rules around the country, local district courts around the country, when adopting their local rules use different terminology than "guide" or "familiarity"; is that correct?

A. There are different formulations in which a federal district court make reference to applicable state law.

There has been an extensive project under the sponsorship of the Federal Rules Committee, of which I'm a member, looking into local rules, looking into local rules in particular concerning their Disciplinary Rule. And I think Professor Cocalette (phonetic), who is the chair — who is the project leader for that has written an article.

But the array of ways of referring is truly extraordinary. The most extraordinary, I think, are two districts in the federal court system, God save them, where they refer to the ABA Canons of Ethics of 1906, and they haven't amended them since. So I haven't any idea what the rules are in those districts.

Q. Is it districts in Texas?

A. Not as far as I know. I think one of them is in Georgia (13) and I don't know where the other one is.

But at any rate, usually what they do is, to refer to the contemporaneously effective rules in the states, and there's a very good reason for it. Because that's a comprehensive code, or substantially so. The federal courts don't want to get into the business of trying to write their own code, among other things that would impose a hopeless set of problems on lawyers trying to figure out which set of rules to follow. And so they have, wisely in my opinion, done as is done in this district. Which is to point to the state's — rules of the state or the federal district court sits and says "follow them." What I'm saying is, the difference where that is the general pattern is, some of them say "we hereby adopt." That's one way. That's the most common. And some say "those state rules will serve as guides," or words to that effect, which is what are said here.

Q. Now, you're familiar, aren't you not, with Local Rule 3 of the Rules for the Eastern District of Texas?

A. I've read it with care.

Q. And the provision 3(a) that speaks about "The standards of professional conduct adopted as part of the Rules Governing the State Bar of Texas shall serve as a guide governing the obligations and responsibilities

of all attorneys appearing in this Court," what is your (14) understanding of that provision?

A. Well, that you look to them, particularly when one wants to understand in a systematic way what the standards of conduct are. But I take it, it's a sort of a reservation of saying, "but we do not commit ourselves irrevocably to all of their provisions."

And, indeed, the Fifth Circuit has held, in a very important case on the question of conflict of interest, that it was not going to apply the Rules of Texas which they thought were too latitudinarian, not sufficiently restrictive; and instead, applied the rules that are recognized everywhere else and are more restrictive concerning conflict of interest. I take it that what they were saying is, yes, we'll follow the rules in Texas as a guide, but are not constrained by them when it comes to matters of importance where we think the Texas Rules are out of harmony with generally prevailing standards which is true and incorrect, which is what the Fifth Circuit concluded.

Q. There is further terminology in Local Rule 3 that attorneys practicing in this Court should be familiar with the duties and obligations imposed upon members of the Bar by the Texas Disciplinary Rules of Professional Conduct, is this also the type of reservation you've spoken about with regard to what district courts do when they don't feel comfortable about adopting a specific set of rules?

(15) A. That's another way of putting it, to say you should be familiar, as it wouldn't say that unless you expected people to pay attention and to guide their conduct accordingly. That's what I take that to mean.

Q. Is it your understanding that the Texas Rules of Discipline have been specifically incorporated into the Local Rules for the Eastern District of Texas?

A. Well, there is a problem of terminology, if I am not mistaken. I think that the rules of professional conduct, small letters, in Texas are the, capital r, Rules of, capital p, Professional, capital c, Conduct; and I'm not

sure that this is the correct title for them, it says: Texas Disciplinary Rules of Professional Conduct. But I take it as clear that they're referring to the rules that have been adopted under the authority of the Supreme Court of Texas.

Q. But whether it's the Rules Governing the State Bar of Texas, which is referenced in the first part of the paragraph, or the Texas Disciplinary Rules of Professional Conduct, there is no specific mention in Rule 3 about the adoption by the judges of the Eastern District of Texas of the State Bar Rules as their rules?

A. That's right; and in fact, it says "serve as a guide" which is kind of a — it's admonitory, and strongly so; but it's not an incorporation of a specific set of rules as a binding code. And the same is true, of course, with the (16) admonition to be "familiar with."

Q. Does that permit judges of the Eastern District, or any other district that has this type of terminology, to determine on an ad hoc basis what rules or regulations should be applied on a specific case?

A. Well, that's, I guess a question, I would say my understanding is, that that would be improper for the same reason it would be improper for any tribunal to adopt — to apply rules that it decides ad hoc are appropriate. And particularly in the case of the practice of law, which is a very intensely, disputatious activity both in court and in negotiation. That's the nature of law practice. It's a highly contentious activity relative to other kinds of activity, business or being a doctor or whatever.

And therefore I think it's particularly important, which is why we write these rules, that one pay close attention to the rules and not — I think it's quite inappropriate for a court to be, in any sense, at liberty to bring to bear a rule when it is not clear that the conduct in question is covered by the rule. And I would say that's true of rules of jurisdiction of a court as concerning disciplinary matters, as well as the substantive rule. Because, in effect, to the extent that the Court is acting

— guided by its judgment as distinct by guided by law, it is a condition in which the Court may feel acting on public — to the (17) public good, but it nevertheless is not acting in accordance with law.

I happen to believe very strongly in the social importance of law. May be hypersensitive on that; but the business of ad hoc embracing of this law or that, I think is the equivalent of not having law at all.

Q. Does Rule 3 give the judges of the Eastern District some latitude to determine, on an ad hoc basis, from your reading of the rule, whether or not someone is bound by provisions of the Texas Bar?

A. Well, I would put it this way: I think that if one is seeking to call a lawyer to account, it should be on the basis, either by reference to a standing rule of local 'local rule of court, or an order in a case, or to provisions, in this case, of the Texas Rules. With a possible exception, that if there's conduct that is obviously wrong but for some reason outside the scope of those rules. One I'm brought to mind is the business of molum in se, which is an old concept in canon law, that there would be some justification. My estimate is that there aren't any kinds of conduct not embraced fairly within the rules, because they talk about conduct, for example, indicating dishonesty or a lack of ability, incapacity to practice law.

So I believe that it would be an unusual case, to put it (18) mildly, where you could say, this is wrong even though — and the basis for proper action against the lawyer, even though one can't point to a rule that covers the conduct in question.

Q. Professor, I want to go back for a moment to your credentials before I get into the specific counts of this case. Presently you're a Professor of Law at the University of Pennsylvania?

A. Yes, sir.

Q. Can you briefly describe to the Court, please, your educational background?

A. I graduated from college. I went to Columbia Law School in 1954, I graduated. I was admitted in the Oregon Bar. I practiced there for three years in a private firm. I worked for one year for the Oregon legislature.

MR. ROEBUCK: If it please the Court, I'm satisfied he's qualified in this regard.

THE COURT: I have his curriculum vitae.

MR. ANDROPHY: Can I tender that as an exhibit, Your Honor?

THE COURT: Yes.

MR. ANDROPHY: And I'll mark it as L.

THE COURT: Any objection to L?

MR. ROEBUCK: No, sir.

THE COURT: L is admitted.

(19) THE WITNESS: Contends therein are true.

Q. (By Mr. Androphy): Have you written — before I get off the subject, even though we've tendered the resume, any articles in the area of ethics and professional responsibility that you've authorized?

A. Yes, there are many of them and they're listed in the CV, they're books, many articles. I do a monthly column in the National Law Journal, "A More Popular Kind of Literature."

Q. Have you written any articles that pertain to the discipline of lawyers by federal courts throughout the country?

A. I don't think I've written on that subject. I've written on the disciplinary process at large, and I've written articles that are relevant to the federal courts as such. Our function on the Rules Committee has required me to give a lot of attention to that task, as I, hope, indicate in my earlier testimony. I don't believe I've written anything specifically on that.

Q. Now, with regard to the specific counts of this case, you've had an opportunity, have you not, to review the Amended Show Cause Order signed by Judge Schell?

A. Yes.

Q. And what I would like to do — do you have a copy of that in front of you?

(20) A. It may be in this book; but if so, I couldn't identify it.

Q. Let me give you a copy of mine.

A. Do you need it in asking me questions?

Q. No, that's fine.

MR. ANDROPHY: Your Honor, I apologize. Do I have to request permission? I don't what know the rules . . .

THE COURT: Normally, as you approach a witness, ask for permission.

Q. (By Mr. Androphy): With regard to Count I.

A. Yes.

MR. ANDROPHY: Your Honor, I understand that the Court is not getting into count I; but what I would like to do is have Professor Hazard talk about it. We may end up revisiting this specific count; and for the record, it's not going to take an exceptionally long time.

THE COURT: You want to ask Professor Hazard questions for him so you don't have to bring him back for Count I.

MR. ANDROPHY: Yes, Your Honor.

THE COURT: Okay. Go ahead.

Q. (By Mr. Androphy): You've had an opportunity to review Count I?

A. Yes.

Q. Now, is there anything in particular about the (21) allegations of count I, as alleged by the Court in the Show Cause Order against Mr. Jaques, that is inappropriate from any jurisdictional point of view, jeopardy point of view, or any matter that you would like to address?

A. Well, I think it would be easiest to state it in the terms of the jurisdictional point of view. To answer that, let me refer to Rule 3 and the structure of it.

Q. Do you have a copy of Rule 3?

A. I do. I'm now looking at 3(b). There's 3(a) says what we've talked about earlier: generally you have to

be — you should treat as a guide the rules, I'll say, of Texas here; (b) says: "Disciplinary Action Initiated in Other Courts."

Now, this is a familiar kind of provision. It takes account of the fact that a lawyer in this Court could, on some occasion, have been the subject of a disciplinary action somewhere else, and this is a kind of comity or coordination provision, and the operation, as I say, its similar provisions are found in many state and federal rules. The idea is that if a lawyer has been subject to discipline somewhere else, then that's a matter that is appropriately for addressing in this court by way of coordination or comity.

Therefore, as and when and if Mr. Jaques is subject to discipline and disciplined in Michigan, or where ever, and a determination is made there that he has violated the (22) standards of professional conduct in some way, it would be appropriate, in my opinion under (b), that that judgment of discipline be taken into account in this district or in any other court where he had been admitted pro hac vice, or, for that matter, any other court where he's been admitted on a permanent basis, for consideration as to whether further action in this court should be taken.

Q. What do you understand the word "discipline" to mean?

A. I mean that he has been found by a procedure under the state disciplinary apparatus or one counterpart to the one we're now engaged in; that is, a disciplinary inquiry in a federal court. And I might say, in most federal courts today, the procedure goes forth with a preliminary inquiry in a federal disciplinary committee review as distinct from a preliminary review of some sort by the judges. But in either event, it is that procedure that is referred to and I believe is the correct interpretation of the word "disciplinary action." It does not mean Rule 11 sanctions or contempt of court. It means disciplinary action, referring to it in the — as a result and of a decision by, for example, the Pennsyl-

vania Disciplinary Commission or the same thing in California or whatever.

Then we get to (c), which is, "Conviction of a Crime." And in that case it's specified that it be a felony, and that is a classic basis of discipline. It can be an (23) automatic suspension or disbarment. States vary according to the effect they give to it and — but the point is, that the conviction of a crime is, of itself, significant as a basis for action by a bar regulatory authority concerning the appropriateness of continuing the lawyer in practice. And that reference in this particular role says, "in any state or federal court." Consistent, therefore, with the notion that if one so convicted, it is of significance in this court — speaking now, as it were, in terms of its rule — regardless of where that occurred.

Then we look at (d) "Disciplinary Action Initiated in this Court." And I have to say that, in my opinion, if one interpreted this against the background of the way these rules are organized, the disciplinary apparatus exist the responsibilities assumed by the state where someone is initially admitted, in Mr. Jaques' case of Michigan, and taking account of dual state admissions, for example, I'm a member of three bars, and take account of pro hac vice admissions and admissions in federal courts. Those are four different kinds of permutations. And understand that each one of these legal systems has its own disciplinary apparatus. In my opinion, the proper interpretation of (d) is that, the court whose disciplinary action is to be set in motion, and in this case the Eastern District of Texas, refers to conduct occurring in that district. And therefore (24) I am deeply troubled, to put it mildly, that this Court would think it fitting to attach disciplinary consequences in this district, to conduct that does not fall within (b), which is disciplinary action in another Court. It could well do it if Michigan were, for example, to discipline Mr. Jaques. It is not disciplinary action initiated in another court, nor is it conduct that occurred

in or about this court, I'll put it that way. I don't mean it has to be actually in the courtroom. Obviously, many professional offenses can be occurred in the law office in relation to a court.

But it does — it seems to me that it is a proper interpretation of that rule. That it refers to these various forms of misconduct unbecoming a member for failure to comply with the local rules, including the Civil Justice Expense and Delay Reduction Plan; unethical behavior; inability to conduct litigation properly and so on, (A), (B), (C) and (D).

And then you go on to (E), because of conviction by any court, which, again, suggest that it's now specifically referring outward, where it wasn't in (A) (B) (C) (D) and (E), of a misdemeanor offense involving dishonesty or false statement. And those words are of particular significance because, as reflected in the Rules of Professional Conduct, dishonesty and false statements are particularly heinous (25) offenses when committed by a lawyer. And that is recognized right in the Texas Rules.

So my conclusion is that, if you understand the larger framework, that it would be an inappropriate interpretation, I guess is the right word, to suggest that this Court properly should consider conduct under the headings of (a) through (d), that didn't occur in this district or, as the terms I've used it, in or about this court. And I say that as someone who is familiar with the background of the way these rules and the disciplinary apparatus are established and have evolved.

Q. Is the sole basis for the court to exercise an extraterritorial jurisdiction, is the issues that you've just discussed under (b) and (c) exclusively, to the exclusion of (d)?

A. Well, (b), (c) and (d)(E). Under (E) because there it says "any," and I think you could interpret that as any court including ones outside the Eastern District. Though, there could be an argument that if given the structure of the way this thing is put together that it

should be so limited; for example, to any state court in the district. But if I were doing it, I would interpret that, particularly because it refers to offenses involving dishonesty and false statement, that you could read the word "any court" to refer to a court anywhere. But with that important qualification, (26) the answer to your question is yes.

Q. Is it vague, in terms of (E), in terms of the fact that it's under a specific title, "Disciplinary Action Initiated in This Court"?

A. Well, I think that ultimately is a legal conclusion. Obviously, you could read it otherwise.

All I'm telling you is, that I think if you understood the history and structure of the way discipline is organized, that the way I've suggested it ought to be interpreted is much more consistent with the general pattern, the history and so on, than would be the notion, for example, that this Court could disbar someone here for conduct that had occurred say in Michigan, concerning which Michigan had not brought a disciplinary conclusion, case to conclusion.

And among the reasons is, you think, well, suppose it did, what would the consequence of that be in Michigan? Would Michigan then be required, under its comity rule, because they have rules like (b) in Michigan — would it then be required to say, "Well, whatever we think about this, we are required, with some degree of obligation, to accord faith and credit"? It's a federal judgment. A federal judgment of conviction of discipline is entitled to faith and credit in Michigan. Unless, as it were, was rendered without jurisdiction, it would seem to me to follow (27) that Michigan would be required to accord faith and credit to that determination, with the effect in Michigan of, in this case, Mr. Jaques' right to practice law there. And I really think that that is a perfectly extraordinary set of consequences to set in motion by invocation of Rule 3(d).

Q. You would have a trail of courts deciding matters that the originating court, the Michigan Bar — or the originating bar has not ruled upon yet?

A. Well, and, one, you might say that it's their field of primary jurisdiction. And I think that's a very serious kind of implication.

Q. Should courts defer, as a matter of comity, or any other reason, to a bar, like in this specific case on Count I, should the courts, as you interpret Rule 3, defer to the Michigan Bar before it takes any action, if any, against Mr. Jaques or anyone else?

A. Well, I can tell you that that's what most bar authorities would think they ought to do. That they would think say in Michigan, if you had somebody, Pennsylvania lawyer who is then subject to Pennsylvania proceedings and the question was what they ought to do about it in Michigan if he had been admitted there pro hac vice, or, indeed, if the conduct had occurred in Michigan — in Pennsylvania, and the person was admitted permanently in Michigan, I think that Michigan would say that we should defer to Pennsylvania (28) until the Pennsylvania thing is complete. If Pennsylvania then convicts him, then it comes under (b) and we can proceed. If Pennsylvania doesn't, then we can — ordinarily what they would say is that's the end of it.

And I might say that that is the rule on choice of law that the ABA has recommended in its recent adoption when they've gotten into this business of interjurisdictional conflict.

So I think when you think about these implications that the basic line is defer to the tribunal, the disciplinary tribunal of the state or, in the case of federal court, the federal court, where the transaction occurred and see what they do, rather than assuming jurisdiction, as it were, extraterritorial.

Q. Is a penalty of sanctions of $15,000 in Michigan in federal court and a mistrial, the same as discipline of an attorney has provided under (b) of Local Rule 3?

A. I do not think so in the language customarily used in this field. The term "discipline" — particularly since the promulgation of the ABA Code of Professional Responsibility in 1970, where they drew a sharp distinction between disciplinary rules and discipline, and the ABA followed it up with the reform projects on discipline as such. There's another set of rules that talk about disciplinary procedure; and before that, you know, the canons were very murky as to (29) what they were, That's all there was prior to 1970. The ABA canons were looked to — is the way the courts usually put it — for guidance in questions of professional conduct. That was a very unsatisfactory situation, because lawyers really couldn't tell whether the canons were to be treated as law or sort of admonitions or what.

The Code of Professional Responsibility in 1970 sharply drew the idea of law, and concurrently the — there was a substantial step up in the intensity of enforcement of discipline. And, in my opinion, when you talk about disciplinary action, you're talking about suspension, disbarment. Disbarment is the ultimate. Disbarment, suspension, admonition, private letter of warning and so on, but at the hands of a thing called the disciplinary committee or discipline board of lawyers or whatever they call it in any state. And I don't think a Rule 11 sanction is fairly embraced in that language.

Q. Now, with regard to the question — and I'm sticking, also, at this point in time I'm still on Count I. Does there ever come a point in time where an issue is concluded, it's given some, as you understand the rules, res judicata affect, so that the courts in other judicial bodies cease from attempting to discipline someone?

A. Well, the rules are as follows — I realize I'm talking a lot about law, but I think it might help. It helps folks (30) understand how this thing works. It is a general principle that a finding of a sanction for civil contempt or other adverse judicial action or, for that matter, conviction of a crime, does not preempt disciplinary action. But the claim has been made from time to

time, "I got convicted of 'X,' therefore you can't discipline me." And the disciplinary authorities, with the support of the Court, have said, "No, that's nonsense, you can get convicted of something and we can pull your licenses." So that even criminal conviction is not preclusive of subsequent disciplinary action.

And second, the same holds on interjurisdictional. The fact that conduct was done say in Illinois and the Illinois disciplinary board decided not to do anything about it, for whatever reason, doesn't preclude, for example, Missouri, if the lawyer is also admitted in Missouri, from reconsidering the matter, if the conduct significantly relates to Missouri.

So, in general, there's res judicata in a disciplinary agency and there's comity between agencies, but discipline can go forward despite whatever might be the other kinds of legal sanctions.

Q. What about one federal court assessing sanctions and then another federal court outside the jurisdiction where the sanctions were assessed in attempting to also — are attempting to discipline a person?

(31) A. Well, I think technically that there isn't res judicata. And one of the consequences of that is, that one ought to ask, in my opinion, whether it's appropriate for the Court in question here in the Eastern District to consider those matters that happened somewhere else within their jurisdiction. Precisely because res judicata doesn't apply, if the second proceeding is one of discipline. Because if the Eastern District of Texas can apply its discipline to conduct say that consist of a basis for a Rule 11 sanction in the Eastern District of Pennsylvania, among other things, the judges in the Eastern District of Pennsylvania have now got to ask themselves, "If I impose this sanction, is it going to mean that this lawyer from Texas, now admitted here pro hac vice, is going to get disciplined back in Texas?" That is this comity thing is kind of complicated.

And I think that that is a very strong reason for the structure, the culture of the structure that I — that I gave. Because certainly if I get — found certainly liability or convicted in Pennsylvania, that's no defense to losing my license there.

Q. What about double jeopardy and its application?

A. Well, I think the courts have said — I mean, people have said in disciplinary cases, essentially it's argument. "You can't pull my license, because I've already been convicted." And the Court said, "Look, licensure is one (32) thing. Yes, they are both sanctions. They are both penalties. They both have adverse consequences. You can have due process in both, but losing" — "being convicted is not an objection to a disciplinary action contemplated" — "that calls for pulling your license." There isn't any double jeopardy there.

Q. What about a court in a jurisdiction sanctioning someone under Rule 11 and then another federal court attempting to additionally penalize a person?

A. Well, I think if a second court tried to hit him with Rule 11 again, you'd have a res judicata question. But because of the structure I've described, I don't think that it's a bar in the second court, but that — but, I mean, the reality of double jeopardy is there. The person is being hit up twice for the same thing.

And that returns me to my position that I think that this ought to be kept in mind when you read these rules. Because otherwise any time somebody gets — whose a member of a bar of two places and gets sanctioned in one, the other place can treat it as a basis for, and in this case I understand the suggestion has been that it's a sufficient basis for, imposing discipline in forum number two. And I say that's a hell of a consequence.

Q. What about the issue of appeals of sanctions by one lawyer in one district? Should, from your review of the ABA (33) and rules and your standing on these committees, should courts defer to a file adjudication by a disciplinary committee before taking any action, if in fact it was authorized?

A. Well, that's the point of (b), it's to say if you've got a disciplinary proceeding in some other state and there's a question whether you ought to discipline the person on the basis of that conduct, the normal way is to let that conduct go to adjudication in the first state and then you're enabled under (b) which represents a universal rule. That is, once somebody has been disciplined in his home state, or home jurisdiction, then one can consider whether further sanction might be appropriate in the second jurisdiction. But that's a different cup of tea.

Q. In summation with regard to Count I, what is your opinion with regard to this Court's jurisdictional capability of disciplining Mr. Jaques?

A. Well, I think I've adequately explained what my opinion is.

Q. Now, with regard to Count II, are you familiar with the allegations of count II?

A. That involves conduct that did occur here. And that involved the conduct of Mr. Jaques in the deposition in the *Carroll* case.

Q. Now, with regard to this specific count, how do you (34) view — you were in the audience when —

A. Yeah.

Q. — Mr. Jaques was testifying with regard to when the questions were being propounded about his capacity as a litigant vis-à-vis a lawyer?

A. Yeah, yeah.

Q. What thoughts, Professor Hazard, do you have with regard to the issue of one sitting at a deposition as a litigant vis-à-vis a lawyer?

A. I look at the texts of the charges and he says, "In fact, I'll make my appearance." Now, if that doesn't speak in futuro, I don't know what does. It's a threat, a suggestion, a promise; but it's not an appearance. And then he goes on, "I'll make my appearance of counsel and start," which implies future action, limiting," meaning limiting the deposition myself.

As I understand the record, Mr. Jaques was not, at that time, counsel of record or counsel in any sense of the word, he was a witness. I cannot understand how this language can be interpreted as saying, "I am now becoming counsel." At most, it's a threat that "I will do so."

But obviously that's an interpretation, ultimately, for the Court. As I just say, that doesn't look like an appearance to me.

Q. With regard to one's mind set at a deposition, whether (35) acting as an attorney or was there acting as a client, is there a different mind set with regard to how one is viewing the questions being propounded from a — I know you're not a psychologist, but you've had enough familiarity with the rules with regard to the determination of whether when one is acting as a client or as a lawyer, have these issues come up before in your rule-making standards?

A. Well, they come up everyday in my consulting practice.

If one is a witness, as I am here, Mr. Roebuck gets his endings with me and I have to speak as truthfully to him as I can. I'm not here to make an argument as such.

Obviously, it's a — these statements, I take it, are helpful to Mr. Jaques, otherwise he wouldn't have me here.

But I consider that I'm a witness and that I'm bound to speak truthfully and I'm bound to speak truthfully to Mr. Roebuck. I'm not managing the litigation, making a presentation or, as I say in my civil procedure course, being producer of the event. That's what an advocate is. And I don't say that with disparagement, that's what an advocate is. You're standing outside the transaction and presenting. When you're on the witness stand, it's a very different ball game and particularly if your personal conduct is at issue. And I can tell you from having worked with lawyers who are themselves parties in malpractice litigation, there is a lot of difference between

being an (36) advocate and being a party; a lot of difference between being an advocate and being a witness.

So I think this is not a formal distinction; I think it's a distinction of real substance. The whole psychology of what you are when you're a witness is, is that you at the mercy of the lawyers to ask you what they will. When you're a lawyer, you're on the other end of the stick; and I think it's a very a different role. And I think therefore that this formal distinction "I'll make my appearance," counts for a lot.

Q. Mr. Jaques received a 7,000-dollar penalty in his individual capacity by Judge Schell. From your professional experience, should that, as a matter of law, conclude any sanctions against Mr. Jaques?

A. I think that it should conclude sanctions. I do not think, as I said before, that as such it precludes the proper imposition of proper discipline. But that really states the problem, trying to treat this as a basis for disciplinary authority. In effect, you introduce de facto double jeopardy.

Q. With regard to Count II, then, should Mr. Jaques be sanctioned by this Court any further as a being [*sic*] lawyer in the case?

A. I don't think he was lawyer there. There's no evidence that he was, and the evidence is that he was not. He's been (37) sanctioned as litigant. That I think is res judicata.

MR. ANDROPHY: Your Honor, with regard to Count III, is it my understanding, since the prosecutor moved for dismissal, that in fact it is dismissed and I'll —

THE COURT: Yes.

MR. ANDROPHY: — go on to the next one?

THE COURT: Yes, it is.

Q. (By Mr. Androphy): With regard to Count IV, the matter with regard to the judgment against Mr. Jaques in the *Carroll* case?

A. Yeah.

Q. Did the Local Rules provide a basis for discipline for Mr. Jaques with regard to this specific count?

A. I think they could. On the other hand, in that case, he was a litigant rather than a lawyer and, as far as I can see, he has not been convicted in any court of a misdemeanor involving dishonesty or false statement, looking at (d) — at subsection (d)(1)(E). If he had been convicted of this, as the statement, "found guilty in a civil case," there could be a predicate in that transaction for discipline, because it's conduct that clearly occurred in this district.

But as far as I'm aware, he didn't, he was never convicted. And then the question is whether his being found guilty of fraud in a civil case is, of itself, is sufficient evidence in the absence of further proof concerning the (38) circumstances to arrive at a conclusion about it.

I will tell you that the normal practice in disciplinary matters where a lawyer has been accused of fraud and there's a parallel civil proceedings, which sometimes happens, is that the disciplinary proceeding is conducted on a de novo evidence basis. That you don't simply accept the finding in a civil case, even if it's at the same nominal standard of guilt, clear and convincing; and for at least one reason, which is that the consequence are very different. A fraud judgment is no picnic and it can be very heavy, but it is not disbarment. And as far as I know, all of the case I've ever run into in disciplinary action where there's a charge of misconduct that is also the basis of a civil claim, that the facts allegedly supporting the charge must be independently established in the disciplinary proceeding, and you can't simply say, well, they found him guilty in the civil case, end of discussion.

Q. Would that be particularly so, also, if the civil case is on appeal?

A. Well, sure. And that's the general principle of res judicata. That if a matter's on appeal, ordinarily, if it's a matter of consequences, this certainly is, that what you

would do is to wait the appeal before you could say that it's final. Technically it's still res judicata. But when we run into this all of the time in civil cases, what you (39) normally do is to wait out to see whether it's going to be accorded finality.

Q. What happens, and do you have any experience where, or your discussions on your committees, where courts have taken the initiative to discipline people for matters that were on appeal and that the Appellate Court ultimately reversed cases, have there been discussion about how you resolve these types of conflicts?

A. Well, I don't know of any formal writing on that. But it certainly is a problem that's very salient in disciplinary boards and their typical reaction will be to hold up the disciplinary matter — typically it will be a criminal case. But they'll hold it up until the adjudicative matter, the criminal or civil case is done, so they then can — for one thing it frees up the Defendant under the Fifth Amendment, which is a problem in discipline. Otherwise, you can't ask him any questions if it's still a pending criminal case. So the way they do it is by, wait until the one gets done and then you go ahead with the disciplinary matters. It eliminates that problem that if you found the guy guilty and then the judgment is reversed, what the hell have you got?

Q. Obviously, you'd have a way of discipline during the period of time prior to the appellate finding.

A. Well, you could if you had an independent evidentiary (40) determination. Then, according to disciplinary matters, it's got its own record and it makes its own determination. And that would not be upset as such by, for example, a reversal in the criminal case.

Q. For that —

A. Here I understand you're relying on the fact of a finding in the civil case to establish the fact of misconduct constituting a disciplinary offense, and that linkage is the very problem that I'm suggesting.

Q. For that matter, should a Court, in a disciplinary proceedings like this, be judicially knowing in accepting

various findings from different judges without a relitigation of the specific issues involved?

A. Well, that's exactly — I mean, that's the necessary effect. If you're going to have a de novo evidentiary consideration, obviously you're not treating the prior determination as sufficient, and I would think it would need you to exclude it and start over again on what the facts are.

Q. Specifically, (d)(1) capital (E) states that there needs to be a conviction by a court of a misdemeanor offense involving dishonesty or false statement?

A. Well, that's the point. The point is, in a conviction, you've got proof beyond a reasonable doubt. You do have a problem there even so, sometimes, exactly what the conduct (41) is. Now, that's not too serious a problem in criminal cases because of the requirement of specificity of pleading and proof, so that you not only have a high burden of proof but you have a very focused, specific charge of what the conduct is and that eliminates ambiguity and the question of, well, is the same conduct now also a disciplinary offense. On the other hand, if you get a civil case, civil fraud is fuzzier by a good deal than criminal fraud and there can be a real question whether, even assuming the burden of proof being the same clear and convincing, whether, in the words of the law res judicata, it is the same conduct. Because a civil fraud case can be made out with different kind of evidence than you can make out — you're required in order to establish a criminal fraud case.

Q. But civil findings of fraud are not covered under (d)(1) capital (E)?

A. It says "conviction," that's a criminal case.

Q. With regard to the statute of limitations that we have argued to the Court, are you familiar with 15.08 of the Texas Rules of Disciplinary Procedure, specifically the statute of limitations?

A. Yes, it's a very unusual rule. A rule in most jurisdictions is that there is no statute of limitations on dis-

cipline. In Texas they decided, for reasons that are certainly understandable, that there should be a statute of
(42) limitations on disciplinary matters, partly because of the consequences in many jurisdictions that you could dig up a very old offense against somebody and — but most courts have resisted imposing a statute of limitations, but Texas has got it.

Q. If there is no statute of limitations, do courts generally look to the applicable state limitations period in deciding whether or not to impose some sort of restriction on time?

A. Well, the general law of federal courts — and I'm now speaking of my work on the basis of my work in civil procedure in federal jurisdiction, is that federal courts will borrow a statute of limitations.

Now, there's a very tricky question here, to be straightforward about it, as to whether a federal disciplinary violation should be governed by a state statute of limitations. For example, federal criminal charge has its own statute of limitation. There's now a general federal limitation period.

But I think it's a difficult question, whether the federal court would be bound by a state statute of limitations unless it adopted the state rules that are — that themselves incorporate a limitation. And it seems to me, that if you read subsection (a) along with contemplation of these consequences that if you're saying while we're
(43) pointing to the Texas Disciplinary Rules as a basis for assessing conduct, I would think it would follow that you would point to the whole set of rules, therefore incorporating the statute of limitations period built into the Texas Rules. You wouldn't have that problem, for example, in states where I'm admitted, because they, like most states, don't have statute of limitations on disciplinary proceedings.

But it seems to me, that, apart from everything else, if you're saying we're taking the Texas law, I would have thought it follows that what you have done is to take the Texas law in both branches, the substantive defini-

tions and the limitation provision as well. It would be strange, though not impossible, to think if you take the substantive definitions of conduct, but that you don't take the statute of limitations.

Q. If a fraud occurred in November of '84, and a Court holds that as a matter of law that Plaintiff's knowledge was sufficient to begin the running of the limitation period as early as December 2nd of 1990, and in consideration of that if you were to look at 15.08 of the Texas Rules with the four-year statute of limitations, would those facts preclude the Court from issuing discipline in a federal setting as it pertains to the situation to Count IV?

A. Well, you have to answer the first questions is, would (44) you say that if the charge is a violation of conduct defined by the Texas Disciplinary Rules, do you also appropriate along with it the limitations period; and I, for reasons I've indicated, I think the correct answer to that ought to be yes. If the rule of limitation is a time bar extending back from the date of prosecution say 1996 back to 1992, that's called four-year statute of limitations running backward to — from 1996. Then the question is, as it were, has anything — and the event in question happened in 1990, and you say, has anything happened to toll it? And there was some discussion this morning, that I have to say I found extraordinary, that would suggest that it is tolled, that is, its running is stopped, until the offense is made known to the tribunal.

Now, I ask you to think about what that would mean on a statute of limitations as applied in ordinary mail fraud. Can the Government prosecute somebody for mail fraud saying that, well, no U.S. Attorney and no U.S. Judge knew about it until we conducted the investigation? I think that's just an inadmissible possibility. The question of knowing about it is relevant in civil claims and it's essentially the idea of laches, that once you know about it, you've got a time to do something about it.

But the statute of limitations in a criminal case is not dependent upon the tribunal's becoming apprised of the fact (45) that the accused — that there is suspicion of the accused having done it. And we got into the same thing this afternoon. And I have to say that if that's — that is a perfectly extraordinary idea of the way in which a statute of limitations works. In criminal cases, it works from the time the event charged was committed, not from the time that it became within the knowledge of the victim or within the knowledge of the prosecuting attorney or a tribunal.

Q. With regard —

A. And I would think exactly the same reasoning would apply with respect to application of a statute of limitations in a disciplinary proceeding.

Q. With regard to Count V, the case involving the, as we refer to as the *O'Neill/Judge Kent* case?

A. Yeah.

Q. Do you have any thoughts, Professor Hazard, with regard to Mr. Jaques' involvement vis-à-vis this court's attempting to discipline Mr. Jaques for his involvement or enactivity [*sic*]?

A. Well, blatant forum shopping is not, as far as I'm concerned, a disciplinary violation; in fact, most Plaintiffs that I know of that's what they do. You blatantly forum shop and pick the best possible place to file a claim; and, indeed, I think it's a duty of a lawyer to do that.

I might say there's a case just came down in Texas, I (46) think in The Court of Appeals, where a lawyer did some really blatant forum shopping and the Court dismissed a civil case complaining about it.

Q. If a lawyer doesn't sign off on a complaint or appear on a cover sheet as the attorney of record and then a federal judge sanctions that attorney for acting as the attorney of record because the Court was under the incorrect assumption that the lawyer participated, would it be — is it within the province of rules to attempt to discipline that lawyer based upon judicially noticing a prior opinion?

A. Well, there are two problems with that. The first is the one I talked about earlier, knowing exactly what happened. Exactly what happened in connection with imposition of a Rule 11 or Rule 37 sanction is one thing; and, in any event, what the judge did there is res judicata, water over the dam, not to be reexamined here. Knowing exactly what happened for a disciplinary matter is a very different one. Mr. Jaques gave some testimony that indicated there might be some difference between Jaques Admiralty, which is the Law Firm, and Leonard Jaques, who is the individual, who's subject to discipline. There are many cases in which a law firm can be subjected to, given the recent revision of Rule 11, subjected to a Rule 11 sanction. And there's an interesting question whether the same reasoning would apply under Rule 37; that is, whether the (47) firm with which a lawyer is associated is in any sense responsible, as well as the particular lawyer who signed the papers. But under Rule 11, certainly, you can have the firm responsible beyond the immediate lawyer being responsible.

So that it could well be that Jaques Admiralty was validly sanctioned where, if one knew the particular facts now relevant in discipline, there is no proof that Leonard Jaques himself committed the offense for which his firm was sanctioned. And I don't know what the answer to that is; but as far as I heard today, there wasn't any proof on that point.

Q. Is that one of the reasons why courts should not take, as in the *Jones* case, judicial notice of facts that may be in an opinion that may not be accurate or may be confusing and those facts need to be retried in a separate disciplinary matter?

A. Well, you might right as far as they go. I think civil cases are different from criminal and also from discipline. I read this *Jones* case. The first case there was a civil jury suit, and the second one was a forfeiture of the guy's national medical, whatever the hell it was, benefit. And I think that the Court correctly pointed out

that the issues, though similar and obviously arising out of the same transactions, were not precisely the same.

And that could well be the case here, where the question (48) of liability for the sanction, it really doesn't make much difference whether it was Jaques Admiralty or Leonard Jaques, but for the purposes of discipline it certainly does make a difference.

Q. Should — if we were doing it, somewhat this morning, attempting to determine what, for example, whether or not, and in an exhibit that was not introduced, whether or not a case that Mr. Jaques had been removed to federal court or remanded, in disciplinary matters should you be solely involved in interpreting what's in a case rather than permitting the party to have access to live testimony as to, in fact, what occurred?

A. That's why you separately tried them. Technically — I don't know where this is responsive to the facts specifically, because we don't know what the facts specifically were. But technically, a case that finds its way filed by a Plaintiff in a state court, that finds its way into federal court by removal, has not, in my opinion, been, quote, filed, end quote, in federal court, it's been brought to federal Court.

MR. ROEBUCK: Your Honor, didn't — may it please the Court. I don't mean to interrupt.

THE COURT: It's all right.

MR. ROEBUCK: But didn't the Court — that seems — that appears to me to go to the exhibit the court did not (49) admit. So I'm not sure that this testimony is relevant.

MR. ANDROPHY: I'm only talking about it — that is correct. I'm only talking about it in terms of a general statement about an interpretation of a document.

THE WITNESS: I'm sorry, I wasn't — I . . .

Q. (By Mr. Androphy): Let me rephrase it.

A. I apologize for going too far, if I did.

Q. No. But in a generalized document — and we've had documents admitted in this case that the Court has

taken judicial notice of — would I take it that your testimony would be the same, that you should be relitigating matters rather than not — rather than adopting them?

A. Well, that's the reason why, is because when you relitigate, you focus on issues relevant under the law governing the present transaction. whereas when you adopt, you are assuming that a paper rendition at the conclusion of a case, that nominally is apropos or relevant, is addressing the same question that you think you're addressing presently. That's why you have a retrial.

Q. Is that also significant if, in fact, the burdens of proof are different from the opinion that you're attempting to adopt and the trial that you're presently involved in?

A. Oh, sure. I mean, it's standard doctrine that everybody recognizes, that you can't give effect in the second forum to a — where a heavy burden of proof such as clear and (50) convincing applies, to a finding that was predicated on a preponderance standard.

Q. Now, with regard to Count VI, would your statements earlier, rather than having you re-allege the statute of limitations testimony, would your statements earlier with regard to the issue of statute of limitations that you previously referenced in Count IV be also applicable to this count?

A. Sure. With the additional point that we're not talking about knowledge to anyone, those are events that occurred. There wasn't anything, any question of somebody finding out about them. So what I said before applies, so to speak, with an exclamation point.

Q. And if this matter is pending before the Michigan Bar, what should this Court or any federal court do in light of those facts and circumstances?

A. I think you should do — as I said earlier, it's very exasperating because it does make for delay and so on and so on. But, for the reasons suggested, I think that the system of comity and coordination, such as we have

it, is the way it works, that is the expectation system; and to proceed otherwise, is to invite the legal difficulties that I've suggested and the very serious fairness concerns that I've suggested.

Q. Professor Hazard, I've asked you a lot of questions and (51) in the event that I miss something, is there anything with regard to these six counts, or anything else with regard to the overall jurisdictional aspects of this case, that you would like to add?

A. Well, I think we've covered that other ground plenty.

I do think, to be very frank, there is a serious problem, measured by the general standards of practice, and I'm not going to the talk about due process, because I think that's a legal question, of concerning this Judge sitting in this matter having initiated it. I simply call your attention that the ABA Model Standards for Discipline, which are now, I think, generally recognized, state that the hearing panel in the disciplinary matter — of any member of a hearing panel in a disciplinary matter, which is the counterpart of the judge's function here, should be recused under the same rules that apply to Judges in ordinary litigation.

Now, what that means is, that if this were some other kind of litigation, and it is shown that the judge had a substantial familiarity with the facts that are now in issue, that under what I understand to be the standards stated in Rule 455 — namely, the judge should recuse himself in any matter in which his, uhh, disinterested might reasonably be questioned — if you brought to bear that standard, which is the standard I'm referring to in this, (52) uhh, it's the ABA Model Rule of the Lawyer Disciplinary Enforcement, Rule 3(f), that I would have thought that the Judge's prior involvement would be a proper basis of recusal. And I think that's a very serious problem.

MR. ANDROPHY: I'll pass the witness.

THE COURT: Okay. Let's take a recess. We'll be in recess for about ten minutes.

(Whereupon a ten-minute recess was had.)

Cross-Examination

BY MR. LEWIS:

Q. Would you agree that the right to practice law in federal court is a privilege?

A. Substantive standards and procedural formalities. Which are concepts usually attached to right. To consider it a privilege to be a lawyer.

Q. Well, would you agree with me that federal courts have the ability to mandate a higher standard for practice in their courts than the mere procurement of a law license?

A. Oh, sure. whether they've done so is something else. I agree with that.

Q. And what was your preface on that? Whether they have done so or not?

A. Whether they have done so is something else again. But if a federal court wanted to set its own rules, conflict of interests, disclosure and so on, I have no doubt that it (53) could.

Q. Do you have an opinion as to whether or not the Eastern District of Texas has established higher standards than merely licensing by the state Bar of Texas in its admission to the Eastern District of Texas?

A. I don't see anything in the rules that indicates that it has, no.

Q. Do you — in your review of Rule 3, am I to understand that you do not read that rule to require a lawyer to comply with the Texas State Rules of Professional Conduct?

A. That's not what — that's not what the rule says. I think the rule has in mind that the lawyer ought to obey those rules. The problem is, it doesn't say it in the clear-cut mandatory form; but I have no doubt that's what they have in mind.

Q. well, when you say the "clear-cut mandatory form," you're talking about your understanding from

your practice of what that mandatory form is; is that correct?

A. Many districts, federal courts, do it by saying, the rules of state "X," whatever our state is, shall be the rules governing lawyers practicing before this district. That's an incorporation by reference, it doesn't leave any doubt that they have thereby made law in the federal court what has been law governing the lawyers in the state. This rule does not speak with that kind of unequivocation. It (54) says they shall be guided by. And I think that probably —

Q. I don't mean to interrupt you, but can I get you to look at the rule that you're referring to, please?

A. Yeah.

Q. I don't think the words are "to be guided by," I think it's —

A. Well, it says "serve as a guide."

Q. "Governing the obligations and responsibilities" —

A. Oh, I understand, but then it —

Q. — "of all lawyers appearing in this Court."

A. Right. I can read it as well as you can. Why did they put in the word "guide"?

Q. And then if you go down to the last sentence it also imposes on the lawyers practicing in the Eastern District of Texas a requirement to be familiar with other duties and obligations, does it not?

A. Yeah.

Q. And you don't read that rule as a whole to say that you have to comply with these Texas State Bar Rules plus these other rules?

A. You can read it as well as I can. If I wanted to write a rule that said, and that there was no if, and, or but, I wouldn't have put the word "guide" in. I'd say "the Rules Governing the State Bar of Texas govern the obligations," that would be the end of it.

(55) Q. You had indicated in your opinion what a number of different states' disciplinary bodies, how they would interpret different things and, in general, what you felt the interpretation by disciplinary boards

across the United States were on different matters. Did you check with anyone in the Eastern District of Texas about prior decisions interpreting these rules, or the history of the Local Rules, and how Rule 3 has been applied or is meant to apply?

A. No.

Q. When we look to, down here to rule — to part (d) of Rule 3, as I understood your interpretation, you read that rule as giving the federal courts of the Eastern District of Texas the power to initiate disciplinary action, only for conduct that occurred in this jurisdiction, or in their courts, with the exception of part (E); is that right?

A. I think that's the best interpretation, given the history and the structure of this rule. The history of general practice in this field and the structure of this rule, particularly having regard for (b) and (c).

Q. And what history did you find in the Eastern District of Texas relating to that rule?

A. I didn't mean to say the history in this district, I meant the general history of disciplinary law and procedure and structure of institutions.

Q. Isn't the first rule of interpretation, that if words (56) are left out, they must be presumed to have been left out intentionally?

A. Yeah. And the second rule —

Q. And they did not say —

A. Or they —

Q. I'm sorry. Excuse me.

A. I was going to say, the second rule is, that they may have been left out by oversight. So you've got to read the rule for its whole sentence. So I don't disagree with that.

Q. But yet, your interpretation of this is, that they left out that it must have occurred in this jurisdiction or this court intentionally, meaning for it to be interpreted as if it had been there?

A. No. No, I think they probably didn't think about it.

Q. But they meant something a little different from what they wrote?

A. I don't think they really thought about it. I think they were thinking about things that were before the Court. That's why a federal court is concerned, primarily, with what happens in or about the court. But I don't think this kind of an issue had presented itself to the — I mean, my estimate would be that, if this presented itself to the draftsman whenever they were drafting these rules.

THE COURT: And you're referring, Mr. Lewis, to Rule 3(d), right?

(57) MR. LEWIS: Yes, Your Honor, I am.

THE COURT: You're looking for language that limits the applicability of that rule, to conduct that occurs in this district?

MR. LEWIS: In this district or this Court, Your Honor.

THE COURT: Okay.

MR. LEWIS: Or, as I understood a part of the questioning, there might be certain things that could occur in someone's law office that related to cases here, that might bring it before —

THE COURT: Sure.

MR. LEWIS: — the jurisdiction of this Court. That's what I understood —

THE COURT: Of Court, yes.

MR. LEWIS: — Professor Hazard's testimony earlier.

THE WITNESS: Absolutely.

MR. LEWIS: All right.

Q. (By Mr. Lewis): And are there — you talked about that Texas had adopted, in large part, the ABA Model Code?

A. Yes, sir.

Q. Could you enlighten us on the parts that Texas changed or did not adopt as part of its code of professional conduct?

(58) A. Not in detail. There were many provisions. One had to do with representation adverse to a current

client in an unrelated matter. That was the one that was the subject of litigation where the subsequent firm in — I've — that was, what was it, *in re American Airlines*, I think, where the Fifth Circuit said that they were going to apply the generally prevailing rule and not that Texas rule. Second, there are a number of modifications in the Texas counterpart of Rule 1.13, I've forgotten what the numbering is in Texas, I think it's 112 in Texas or 12 in Texas, if I'm not mistaken, on the responsibilities of a lawyer for a corporation, there's some modifications there. And I think there are some in connection with trust fund accounting and some in connection with withdrawal, and I think there are some in the rule on attorney fee agreements.

Q. And is there also one on the advancement of litigation costs?

A. There may well be. A number of states have made — that's part of under the rule about reasonable fees, and a number of states have made changes there.

Q. Are you aware of any Provisions under the Texas Code that have been alleged against Mr. Jaques in this case that are not present in the ABA Code?

A. No.

Q. So when we talk about familiarity in knowing whether or (59) not the Texas Code applies, it would not be any different in this case than the ABA Model Code; is that right?

A. I can't think of any, assuming the conduct of the sort was a basis for disciplinary violation. The reason I put that is, I don't want to suggest a conclusion about whether any of the conduct in fact violates any specific model rule.

That said, I don't see anything, let me put it this way: anything unusual or exotic in the Texas Disciplinary Rules that would have application to the conduct in this case.

Q. In other words, if one were familiar with the ABA Model Rules that you had indicated had been adopted, more or less, in 40 some-odd states, they would be

familiar with the parts of the Texas Code that we're dealing with in this case?

A. I think so, yes.

Q. Do you feel that the Texas Bar has a reputation for fairly strenuously enforcing its code of professional conduct?

A. Oh, boy, I think Texas probably is in the middle in that. You know, that's a global question and you ask reputation. I hear disparaging things said about the Texas lawyers that I don't think are true. I can't — I've been in many matters in Texas. I don't see the standards of behavior here a lot different from — or any different from those say in California. I think they are somewhat different in Connecticut but I think that's a rural, how (60) should we say, a local cultural difference, not a difference.

So I don't think the Texas Bar is irresponsible, if that's what you're asking.

Q. Well, my question is more toward the formal bar's enforcement of its code of conduct on its lawyers.

A. I don't have any definite information about that. I think New York, the city, is probably the worst in the United States, frankly; and Oregon, I'm familiar with, is very strict relative to other states in this country. And I would say on that ranking, I would put Texas somewhere in the middle.

Q. Would you agree that there's an unevenness from state to state in enforcement of lawyer discipline by the bars?

A. Absolutely.

Q. Now, you have made reference to the statute of limitations that if we're going to apply the Texas Code of Professional Responsibility, you feel we should also apply the limitations contained therein; is that right?

A. I think that would be the most sensible, most judicious just way to approach it. I don't think you're absolutely bound to, but I think it would be anomalous, to put it mildly. Particularly when you have in mind, as I do, that lawyer's conduct, particularly in preparation of

litigation; that is, outside the courtroom but impinging on the Court, (61) typically involves state matters in the same ball of wax as the federal matters.

So you have an interesting problem if you claim that it's barred under the State Disciplinary Rule, whatever the conduct is, but, okay, it's still open in federal.

So when you start thinking about problems like that, that's the conclusion I would reach. I don't think it's inexorable.

Q. Well, when we look at how Rule 3 refers back to the Texas Rules of Conduct, is it not back to them as a standard for conduct as opposed to a Procedural or enforcement method?

A. Yeah, but you could say the second sentence talks about court decisions, statutes, usages and so on; and, you know, they could say it picks up there whatever wasn't picked up in the first sentence.

Q. So, again, it's talking about conduct and not punishment; isn't that right?

A. It says what it says. I'm not . . .

Q. Well, is there anything in there that refers to punishment, or the procedure for punishment, in Rule 3(a)?

A. No, it says the rules.

THE COURT: Are you reading under — where are you reading? I'm sorry.

THE WITNESS: Well, I was looking under —

(62) MR. LEWIS: Local Rule 3(a).

THE WITNESS: — the first sentence of 3(a); and then if you look at the last sentence, the last sentence talks about Texas Disciplinary Rules of Professional Conduct.

Q. (By Mr. Lewis): Uh-huh.

A. And then it goes on to talk about court decisions, statutes, usages, customs. That covers a lot of ground there.

Q. And then if we turn toward the statute of limitations that you referred to earlier in your testimony on Direct Examination, Rule 15.08, do you have that in front of you?

A. No, but go ahead.

THE COURT: I had it. I can hand it to him.
THE WITNESS: I don't think I do.
MR. LEWIS: Thank you, Your Honor.

Q. (By Mr. Lewis): Does not the last sentence clearly say that limitations in fraud does not begin to run until the professional misconduct is discovered, or should have been discovered, in the exercise of reasonableness diligence by the complainant?

A. That's what it says, sure.

Q. When you're talking about the situation like this, where the Court has now taken up the consideration of the complainant, do you not consider the Court the complainant (63) in that regard?

A. No, I don't. I think that would gut the statute of limitations.

Q. I'm sorry?

A. That would gut the statute of limitations. It means the statute starts running as soon as when the case is brought to the court.

Q. Who is the complainant?

A. Well, that's the question. You just suggested — I thought your question suggested that the Court might be a complainant.

Q. Well, it doesn't say victim does it?

A. No.

Q. It says complainant; and if we're talking about the disciplinary system, it's the person that's making the complaint to the Texas State Bar, is it not?

A. That's what it's talking about in the Texas system, sure.

Q. Well, if we're going to talk about the limitations where it's the federal court, you don't think that it's the Court that's the complainant in that situation for limitations purposes?

A. I think you could say that in this case it was initiated by the Court. It wasn't initiated by anybody else.

Q. Well, that's my question: is that not the complainant?

(64) A. I understand. What I want you to think about is, what does it mean to say, that the limitations period is operative, but it runs only when the facts of the matter come within the cognizance of the Court? I put it to you that you don't have any statute of limitations left.

Q. Well, you have limitations left if the Court didn't know about it until that point in time —

A. If that's what it says.

Q. — would you not?

A. Discovered or should have been discovered, the Court is the person that has to know. The question then is, when did the court know? And that means, well, it knew when it directed its attention to the problem. Which would effectively mean the statute keeps running until the Court energized itself, if it does, to raise a question about it.

Q. And you're saying that should not be the rule in lawyer discipline matters?

A. I'm saying that that's the consequence of that is effectively to nullify this statute of limitations that the Texas Bar has thought was important. It's not a problem in most other jurisdictions, because they don't have any statute of limitations.

THE COURT: But, Professor, assuming that we do have that statue of limitations — and let me look at it from here.

(65) THE WITNESS: Sure.

THE COURT: Now, this says, "No attorney licensed to practice law in Texas may be disciplined for misconduct occurring more than four years before the time when the allegation is brought to the attention of the Office of Chief Disciplinary Counsel."

The reason for my thinking out loud earlier today is that, certainly I didn't have a basis to present what I knew to the full court here until the verdict was returned in this case. Now what I hear you saying is

that, because Mr. Jaques' opponent in that case, or the man who sued him, knew about or should have known about the fraud — I think, Mr. Androphy, you said 1992 in one of my orders is what I said?

MR. ANDROPHY: I don't remember all of the dates.

MR. ROEBUCK: 1990.

THE COURT: 1990. That then the Court, when it received the verdict, was powerless to do anything about that as far as disciplining Mr. Jaques, because the statute had already run.

THE WITNESS: Your Honor, I don't — I'm not here to work out all of the implications that follows. I point out the last word in that sentence that I just looked at says "complainant." So any other question, "Who's that?" that's the question. I put that question to you: Who is the (66) complainant?

THE COURT: Would it not be analogous to say that the Court here is the complainant?

THE WITNESS: But if that's true, if that's true, I put it to you, that there isn't any statute of limitations, zero. Because it means that the event that starts the statute running is it coming within your cognizance.

THE COURT: Yes.

THE WITNESS: And that means quite different from what, I'm sure, the Texas Bar had in mind in saying four years.

THE COURT: It probably had in mind a client who felt he had been wronged.

THE WITNESS: Exactly true, i.e., a guy like Mr. Carroll.

THE COURT: Yeah. But there would still be, to some extent, a statute of limitations, I suppose, if the Court just sat on the information and didn't do anything with it and later decided to do something with it and did it later.

THE WITNESS: It could, sure. It could happen, sure. I'm just saying if it ever, you understand the point I'm making.

THE COURT: Okay.

Q. (By Mr. Lewis): Basically —

(67) MR. ROEBUCK: May it please the Court, Your Honor, I do have something I could add to that, if the court wants to hear me.

THE COURT: Okay, go ahead.

MR. ROEBUCK: Mr. Androphy has suggested that we have no limitations and engaged in what we call borrowing the statute. It appeared to me that in this situation where you have Mr. Jaques who is not subject to being disciplined by the state Bar of Texas, save and except those circumstances being admitted pro hac vice, but in this situation would not be subject to discipline, then whether or not Mr. Carroll had a gripe or not for conduct occurring in Texas, would put Mr. Jaques in the enviable position of not being sanctioned at all in Texas. And then if the Court is bound by the time that Mr. Carroll would have discovered the fraud, then the Court is cognizant also. It seems to me that that could never be the purpose of the law. And if you take this borrowing statute and carry it forward, it seems to me that limitation should run from the time the Court discovered or should have discovered the fraud. And I agree with the court, it would have been the time that the jury returned a verdict of fraud based upon clear and convincing evidence.

THE COURT: Well, do you agree with what I think Professor Hazard is saying; and that is, that if you're (68) going to apply the Texas Rules of Disciplinary Conduct, you apply all of them, including their statute of limitations?

MR. ROEBUCK: I —

THE COURT: Or, because we're dealing with a lawyer from out-of-state, maybe the statute of limitations has no applicability here because it's only targeted to local grievance committee type respondents, and Mr. Jaques is not subject to that in that instance?

MR. ROEBUCK: Well, that's my position, Your Honor. It either applies not at all, or it applies to when the court

would have discovered it. And I'm not — from my perspective, it doesn't make a whole lot of difference. Because, I think, under any circumstance, the conduct is within the Court — the limitations period, if there were any.

MR. ANDROPHY: Your Honor, may I briefly respond? I know it's not appropriate, necessariiy, but I just have one — the court made two — two matters that I would like to address is, they can't have the Texas Rules on one type of a situation and not have it on another. I look at Rule 15.08 when it says "complainant" at the last sentence, these are the State Bar Rules, and when you talk about a complainant, you're talking about the person allegedly that was victimized.

MR. LEWIS: Your Honor, I can clear that up with (69) about two more questions of the witness. The rules are very clear on that and he's in error.

MR. ANDROPHY: But the point I have is, if they were talking about a panel, they would have said "the panel," like this Court would be operating as a panel.

Also, the matter with regard to the Michigan case was taken by Mr. Carroll to the Michigan Bar a long time ago and resolved in Mr. Jaques' favor in the Michigan Bar.

What was the specific?

(Discussion off the record
between Mr. Androphy and client.)

THE COURT: I don't need to get into the Michigan Bar decision.

MR. ANDROPHY: But the point is, is that Mr. Carroll proceeded as the victim in that case, as the alleged victim in that matter. And what I'm suggesting is that, that's been resolved in Michigan and that the word "complainant" here, being used in the way counsel suggest, is, as Professor Hazard has more eloquently expressed, just expanded this Court's — if — if their view is correct, then there is — then 15.08 doesn't exist, it shouldn't even be written into the statute.

THE COURT: Well, the question is, who is the complainant and whether it should apply here?

I would agree, as a general principle, that if you're going to use a set of rules to govern lawyer conduct, (70) you should use all of the rules, and the court should not pick and choose which rule it wants to apply, that's too arbitrary. On the other hand, the question is, how would you apply 15.08 in this context; and I'm not sure about that. But let's go on with the testimony.

Go ahead, Mr. Lewis.

Q. (By Mr. Lewis): Professor Hazard, could I get you to turn to Rule 106 — 1.06(e), please, on the rules?

A. If I had it, I would be delighted to turn to it.

Q. Do you have a set — is that the Texas Rules there? If you will turn to Page 461.

A. No, we've got everything else but Texas in this front print.

THE COURT: All right. I've got it right here.

Q. (By Mr. Lewis): The same set of rules we referred to a moment ago.

A. All right. What is the rule number, sir?

Q. 106(e). Would you agree that that states: complainant means the person, firm, corporation or other entity initiating a complaint or inquiry?

A. Sure.

Q. Would you agree that this Court has initiated a complaint or inquiry in this matter?

A. Sure. And that makes my point.

Q. In your —

(71) THE COURT: Okay. Well, wait a minute. Now expand on that. What do you mean by that?

THE WITNESS: That means that the statute of limitations runs as to an offense. A statute of limitations — let me back it up a minute. Obviously, the statute of limitations is drafted with the idea of the complainant in mind, and that's the person who is victimized. It says, person, firm, initiating a complaint or inquiry, right?

THE COURT: Or inquiry.

THE WITNESS: That's what I said. So it — I mean, I read that as meaning the person who was victimized.

THE COURT: It doesn't say that.

THE WITNESS: I know it doesn't say it. I just asked you what the hell does it mean if it doesn't mean that? The next — the word above it means committee. Now that's your, the counterpart of your officer in the state machinery is the Grievance Committee.

THE COURT: Okay.

THE WITNESS: All right. So they're drawing a distinction between a committee and a complainant.

Now, the problem we have in this situation before us here is, so to speak, that the complainant and the committee are the same thing: you're the complainant and you're also the committee.

(72) THE COURT: Well, but, under the complainant definition, the Court is an entity initiating an inquiry.

THE WITNESS: I understand what you've said, sir. I just point out that if you are the complainant, then the four-year statute to which the State Bar of Texas has attached great importance, starts to run when something comes to your attention as distinct from when the conduct of the lawyer injures some client or a third-party. And normally, the injury inflicted on a client or a third-party would have occurred before it came to your attention.

So I ask you to visualize the situation in which four and a half years ago a lawyer looted the estate, or took the money in settlement of a maritime claim, walked off with it. Then there's a long drag and it doesn't come to your attention until two weeks ago. The statute would have run if the — if it applies to the grievance, but wouldn't of run if it runs from the time that it came to your attention. And I just put it to you that that's a very anomalous structure of a statute of limitations.

THE COURT: Okay.

A. Yes, sir. I am sorry.

Q. (By Mr. Lewis): Professor Hazard, you're not saying that only the victim can be a complainant, are you?

A. No.

Q. As I understand your role here today, you're not here to (73) condone Mr. Jaques' conduct; is that correct?

A. I'm not — I — that's not my function.

Q. You also are not here to say that that is conduct that becomes a lawyer, are you?

A. I've not tried to — the subject of my testimony is quite different. I don't have any opinions about that. I have my own views about how lawyers ought to behave, and I hope I've fulfilled them.

MR. LEWIS: Thank you.

THE COURT: Okay. Mr. Androphy, any questions?

MR. ANDROPHY: May I just have a moment, Your Honor?

THE COURT: Yes.

(Short pause.)

MR. ANDROPHY: May I approach the witness, Your Honor?

THE COURT: Yes.

(*Redirect Examination*)

BY MR. ANDROPHY:

Q. Professor Hazard, I'm going to show you — there's been some questioning with regard to the definition provisions of 1.06 of the General Rules of the Discipline Procedure. I want to bring your attention to Rule 1.06(q)(2) and where it says that — take a moment to read it.

A. Yeah, that's just a comity provision.

(74) Q. Does that provide — does Texas speak to the fact that unless there's discipline in another jurisdiction, they won't consider it, somewhat analogous to the — your testimony with regard to Local Rule 37

A. This means that if a lawyer is in, this is (q)(2), if a lawyer is admitted in Texas and if he does something somewhere else and that person is — and is disciplined somewhere else, he nevertheless is subject to discipline still here in Texas.

But that, of course, is a matter of enforcement discretion which often would be exercised in favor of conducting another disciplinary proceeding in Texas and, for example, disbarment, or if it's relatively insignificant, or if they think they've got enough penalty where he was, ordinarily they decide not to go forward. But it's one of these comity provisions.

Q. Awaiting for finality of the ruling of the disciplinary panel of the other jurisdiction.

A. Well, it says "results in the disciplining of a lawyer," that means finality.

Q. And finally with regard to Local Rule 3 and its provisions. With regard to Count IV, Mr. Jaques has been charged exclusively with the Texas Rules with regard to alleged violations of the judgment in the *Carroll* case —

A. Uh-huh.

(75) Q. — and not specifically Local Rule 3(d)(1)(E). 3(d)(1)(E) provides that courts in the Eastern District may discipline for a conviction in that court of an offense, a misdemeanor offense involving dishonesty or false statement. Would it be your opinion that if they were to proceed — strike that.

Would it be your opinion that by the omission of this language from the charge against Mr. Jaques and merely to the reference of the State Bar Rules, that the prosecutor was attempting to ignore the courts of the Eastern District as to what specifically they were looking towards with regard to any findings of dishonesty or false statement?

A. I would have to tell you that's a question I can't understand.

Q. Okay. I mean, I know. It was too long.

With regard to Mr. Jaques, is it a rule of inclusion, for example, the rules of the Eastern District with regard to disciplinary actions initiated in our court provide that, if there is a conviction of a misdemeanor involving dishonesty or false statement that could be disciplined?

A. That's what it says.

Q. There is nothing in there with regard to an individual being found responsible for any type of civil misconduct?

A. Well, that's what I called attention to the words "conviction," and that means criminal, and I don't think (76) anybody said he's committed a crime.

Now, what was intended by the prosecutor in the formulation of these charges, is something else about which I don't care to speculate.

Q. But it's clear that the judges of the Eastern District, in formulating their rules, did not include civil findings of fraud?

A. I don't know how you could read (E) to include a civil fraud. Conviction means crime.

Q. And this Court, in its rulings in this case, is bound by what's included in its rules and cannot go outside the scope of its own Local Rules?

A. Well, that's a general principle of law.

MR. ANDROPHY: I'll pass the witness.

THE COURT: Okay.

MR. LEWIS: Your Honor, Just a —

MR. ANDROPHY: Oh, one more question. One more question, Your Honor.

THE COURT: All right.

Q. (By Mr. Androphy): Mr. Hazard, Professor Hazard, with regard to the *Jones* case, the Court earlier made reference to the fact that *Jones* was not a disciplinary matter.

A. Yeah.

Q. Would that have any bearing, in your opinion, with regard to the applicability of *Jones* to the six counts in (77) this case?

A. Well, I — is it okay for a witness to raise an objection? I really think that's a question of interpretation of *Jones*. For what it's worth, I don't see why it makes any difference. But that's for the Judge.

MR. ANDROPHY: Pass the witness.

THE COURT: Mr. Lewis.

(*Recross-Examination*)

BY MR. LEWIS:

Q. Professor Hazard, if I might direct your attention once again to Rule 1.06(q) —

A. Yeah.

Q. — of our Texas Rules of Disciplinary Procedure?

A. Yes, sir.

Q. (Q) starts off, "professional misconduct includes . . ."

A. Right.

Q. Then it has a laundry list of nine different items, does it not?

A. Right.

Q. And it talks about, on item two, simply that professional misconduct includes any final finding of misconduct in any other state; is that right?

A. Yeah.

Q. And then it also talks about, under item one, that any violation, any conduct, whether it's actually act or (78) omission, if it violates the Texas Disciplinary Rules of Professional Conduct is in fact professional misconduct, and it does not limit that to the State of Texas, does it?

A. That's right. Texas can exercise authority over Texas lawyers who do something bad somewhere else.

MR. LEWIS: Thank you.

THE COURT: Okay, Professor —

THE WITNESS: Yes, sir?

THE COURT: — do you have any other questions?

MR. ANDROPHY: Just one.

(*Redirect Examination*)

BY MR. ANDROPHY:

Q. Only if it's specifically provided in a rule, correct?

A. I've said that already.

THE COURT: All right. I'll tell you what, let me ask some questions and you all can discuss whatever you want to ask.

Professor, setting aside Rule 3(a), which refers to the Texas Disciplinary Rules of Professional Conduct and that you must be familiar with them and that they're a guide, and just focusing on Rule 3(d) which list (A), (B), (C), (D) and (E).

THE WITNESS: Yep.

THE COURT: Would committing fraud on a client not fall under (d)(1)(A) conduct unbecoming a member of the Bar, (79) regardless of the Texas Disciplinary Rules?

THE WITNESS: Sure.

THE COURT: All right. On the fraud count, we talked about the statute of limitations and that quandary, I think you also testified earlier, that, in your opinion, a disciplinary court cannot simply impose discipline based upon a finding in a civil cause, but must relitigate that issue?

THE WITNESS: Ordinarily.

THE COURT: Okay.

THE WITNESS: There could be exceptions. If you had a case where the — take a criminal case, a familiar example, it happens all of the time, lawyers convicted for tax fraud. You don't have to ferry, in a disciplinary case, whether he was guilty of tax fraud.

The point I was trying to get at, Judge, is, oftentimes, and I think in a number of — and in this case, exactly what it was that was the subject of the prior adjudication is not necessariiy exactly what is involved in the subsequent disciplinary proceedings. And then when that happens, when you have some doubts about it —

THE COURT: Yeah.

THE WITNESS: — then to accept what a court held, I'll assume properly, in the prior proceeding, is not determinative of what is inappropriate conclusion in the (80) second proceeding.

And with all respect, that's what I think is the point of that *Jones* case, is the case they say, the issues posed in the prior suit that went to jury verdict are not necessariiy the same issues, that's not — that's the unstated premise as are now involved in the case before us.

And the Court, in fact, some what —

THE COURT: You don't think the issues in the *Carroll* versus *Jaques* case are the same as one of the issues before me?

THE WITNESS: Umm —

THE COURT: I mean, I can understand if you have a civil case where the issues are different from the issues that the disciplinary court must resolve; but if you have a civil case where the verdict is, that the lawyer committed fraud on the client, why would that need to be relitigated?

THE COURT: In many situations, I would think it would not be. But, then, you have the question — in this case you've got a question about this going up on appeal, which has its own set of difficulties.

THE COURT: Yes, I understand that.

THE WITNESS: You have the statute of limitations problem, and but, I take — I think those are sufficient reasons.

Now, the next question is, what are the evidence (81) rules? And you have a question about whether the prior determination can be brought to bear before this Court.

And I have to say one of the problems, Your Honor, is that you personally know what happened there, and that compounds the problem about the tribunal. Because we're not having a situation where this fact has to be objectively demonstrated to somebody, but rather you're bringing to bear your own recollection.

THE COURT: Well, but . . .

THE WITNESS: You see the problem I'm getting at?

THE COURT: Yes, I am — certainly I'm familiar with that case, I presided over that trial.

THE WITNESS: Yeah.

THE COURT: Of course, I've been of the opinion that I can rely on that jury finding, because it was made by the proper standard that this Court must apply in attorney discipline matters. The *Jones* case may say otherwise, and I need to read the *Jones* case in full.

THE WITNESS: Yeah.

THE COURT: All right. Let's see, on Count I, the assault matter, I think the testimony is not so much that 3(d) by its language limits itself to misconduct within this district or in or about this Court, but that it's unfair to go beyond this district or this Court. Because the other two — there are other provisions such as 3(c) and (82) 3(d)(1)(E) that discuss any Court. And so because 3(d) — because 3(d)(1) doesn't specifically say it could be outside this Court, but it would be unfair.

THE WITNESS: Unfair and extremely inconvenient for the reasons of interjurisdictional consequence that I talked about; that is, the question is: if you find it, does that mean that Michigan has to find it? And I put it to you, that that is a very, in these days of concern about federalism, that is, to put it mildly, an event that the Michigan disciplinary authority would be surprised to have to confront, to deal with.

So it involves — and the third reason, and in a sense the more important one, is the general structure of these things, which is what I talked about, is that this, I think, contemplates what I talked — that it's events occurring in the vicinity of this Court, if I can put it that way, precisely because it has the kind of unfairness consequences that you're talking about. So it's legislative intent informed by the consideration of unfairness.

THE COURT: Okay. You also said on the assault count that — I think you said, misconduct short of a crime in one district should not be the basis for discipline in another district. Of course, this would be a crime but it would not be a felony. As I understand, it's a misdemeanor.

THE WITNESS: Yeah, and then you've — and you've (83) got questions, is that a misdemeanor involving dishonesty or false statement? And I wouldn't have thought so.

THE COURT: No. Okay. But you're of the opinion that misconduct, short of a crime, a felony crime, I suppose, or a misdemeanor involving moral turpitude, should not be the basis for discipline in another district, if it occurred outside?

THE WITNESS: As a general proposition. Because if you look at the structure of these things, and as I say, they've got authorities there that are prepared to look at it and we do have the problem of comity among states; so the cross-examination said, "Well, look, states vary, and that's a condition of life." And I, frankly, infer that this Court has higher expectations for lawyers than, it is my impression, are held by a lot of disciplinary authorities. I'll tell you that. But they exist and we've got the problem, how do you live with these things, so to speak?

THE COURT: Okay. Do you think this — when you say "this Court," do you think this proceeding here indicates that this Court has higher expectations than disciplinary authorities would have for lawyers?

THE WITNESS: I think, to put it personally, I think the way you deport yourself indicates to me that you have a very high standard of expectation for yourself and for others. And I think that that standard of expectation (84) is higher than what I observe to be in the generality of the Bar. That's what I mean.

THE COURT: Okay. I didn't know if you thought I had gone overboard here and saying too picky.

THE WITNESS: Well, I wouldn't use the word "picky." I think you're a concerned citizen and I — I like — I think that's a very good thing. The problem is, as we all know, as we get old and tired that there are a lot of things that are not the way they ought to be, but that doesn't necessariiy mean I got jurisdiction to do something about it.

THE COURT: Okay. Let's see, Count II is the deposition, and I think you said that the sanction that I imposed on Mr. Jaques does not necessariiy preclude discipline, but it does introduce de facto double jeopardy, another unfairness —

THE WITNESS: That's the idea, yeah.

THE COURT: All right. I just want to be sure I have your opinions straight on each of these counts.

THE WITNESS: Yeah.

THE COURT: All right. Count IV, I've already covered Count IV.

Count VI, again, was the Sixth Circuit decision on Mr. Jaques' whereabouts and representations to two courts, he was in one and not in the other.

(85) THE WITNESS: Yeah.

THE COURT: And, again, you would say that that's barred by the statute of limitations here, and that it also occurred outside this district, and I should defer?

THE WITNESS: Yes, and also there's some reason to think, from what Mr. Jaques said on the stand, that this underlying situation was much more complicated than it came out. And we all know, that a lot of times in litigation he fought and got the criminal conviction — the criminal contempt set aside, as I gather. You reach the tactical decision that I'm not going to put all resources I could possibly command in to fighting this issue, on this occasion. And in my opinion contempt is bad. I hope the hell I never suffer it. But disbarment or suspension is worse. And I think that that discrepancy means that you couldn't necessariiy accept at face value a finding in one context when you're comparing it over the other. That's a kind of fundamental institutional comity. It's not written up the law, it's just the way things are.

THE COURT: Okay. I don't have any other questions.

MR. ANDROPHY: Your Honor, the only other thing that I would just bring up to the Court, we've cited it in our briefs, is that the —

THE COURT: Well, I would say this, Mr. Androphy, (86) you've referred to the Louisiana Rules, I think, as a model.

MR. ANDROPHY: Yes, Your Honor.

THE COURT: The Louisiana Rules do allow the Court to rely on prior judicial findings, do they not?

MR. ANDROPHY: Let me get a copy of that.

THE COURT: Do we have a copy?

MR. ANDROPHY: I have them, Judge.

THE COURT: Which would be contrary to the *Jones* case, though.

MR. ANDROPHY: Where specifically, Your Honor, are you at?

THE COURT: 3(a)(2) through (3). Now, those cover crimes.

MR. ANDROPHY: Okay.

THE COURT: And 3(e), (1) and (2) —

MR. ANDROPHY: Convictions, I see as 3(e).

THE COURT: Yeah, (1) and (2). That's covered, crimes. 3(b)(4) and (5).

MR. ANDROPHY: 3(b), Your Honor?

THE COURT: I'm sorry, 3(g)(4) and (5) "Disciplinary Actions by Other Courts in Another Jurisdiction." It certainly allows the Court there to rely on what some other Court has done outside of a criminal context.

MR. ANDROPHY: It speaks in number (4) to the word (87) "discipline," Your Honor, and (5) to the guilty of misconduct, which would specifically narrow it.

THE COURT: Okay.

MR. ANDROPHY: And the other thing, Judge, is, I think I've cited it to the Court already, but the *Tomanio* case, the Supreme Court case in our brief talks about the federal courts borrowing and adopting state statute of limitations.

THE COURT: All right. Do you have other questions for Professor Hazard?

MR. ANDROPHY: No, Your Honor.

THE COURT: Mr. Lewis?

MR. LEWIS: No, Your Honor.

THE COURT: All right, is this witness excused?

(Short pause.)

THE COURT: Mr. Androphy, is Professor Hazard excused?

MR. ANDROPHY: Yes, he is, Your Honor. I'm sorry.

THE COURT: Thank you, Professor. You can stay if you want. Whatever you like.

THE WITNESS: Well, I'm wondering what's going to happen in my future life. Is this proceeding going to be over before too long?

THE COURT: I don't know that there would be any need to recall Professor Hazard. We have the first count, (88) which I'm not going to take up at this time.

THE WITNESS: I'm going to get off the stand while I'm still alive.

THE COURT: All right, yes.

Do you have other witnesses to call, Mr. Androphy?

MR. ANDROPHY: Just Mr. Peterson, Your Honor.

THE COURT: Okay. We'll have to come back to him.

Now, you're going to contact Mr. Roebuck and see when Mr. Peterson would be available, right?

MR. ANDROPHY: Yes, Your Honor, and get him here a report, get him a report or something comparable.

THE COURT: Okay. All right. Then the only thing left here is Mr. Jaques had said he wanted to make a statement to the Court. I'll be happy to hear whatever he has to say.

Mr. Roebuck.

MR. ROEBUCK: Your Honor, in fairness to Mr. Androphy, we had talked about Mr. Peterson providing me with a report. At one of the breaks, Mr. Androphy suggested to me that maybe I would just prefer to visit with Mr. Peterson as opposed to a report. And I don't — if this sounds critical, it's not intended to be so. But Professor Hazard sort of got to be an expert on a whole bunch of things. I would prefer to avoid that with Mr. Peterson, if I can. And I think the best way to do that is, if I had a report from (89) him delineating what his opinions are and that way I can confine my concerns to whatever he says in his report.

THE COURT: I think Mr. Androphy is going to do that.

MR. ANDROPHY: Yes, sir.

THE COURT: Okay. We just don't know when he's available.

MR. ANDROPHY: No. I want to make sure of two things: one, that he's available; two, that his mind set is

such that he could focus. Because this week it's not, for reasons that have been stated in the Affidavit. Which I would prefer, Your Honor, that that be kept under seal forever, as my request —

THE COURT: Bifurcation?

MR. ANDROPHY: Yes, because of Mr. Peterson's Affidavit.

THE COURT: Okay. All right. I would ask to have it filed under seal and I'll instruct the court reporter to maintain it under seal until further orders of the Court. Or the Court Deputy Clerk, rather.

MR. ANDROPHY: Thank you, Your Honor.

THE COURT: All right. Let's see.

MR. JAMAIL: Your Honor, I would just like to tell you, I would want to submit just a short memorandum on this fraud finding that you're taking under consideration. (90) Because this fraud finding in it has implications of insurance coverage and trial strategy which led to only the submission of the fraud issue, when this case could of very easily just been submitted on a negligence theory. And if that would have been the case, you wouldn't even be hearing this case on the — on a fraud finding. And there are specific ethical requirements of defense counsel when you're dealing with coverage issues, and in this case negligence issues — well, negligence issues were knocked out of the case and fraud issues were not.

So I would like to give you just a short memorandum distinguishing the fraud of failure to disclose from a fraud where actual money is appropriated, or something to that effect. Okay. If that would be okay, and I'll furnish Mr. Roebuck with a copy.

THE COURT: Okay. I'm not really sure what you're referring to, but I'll look at whatever you have.

MR. JAMAIL: I want you to at least see the reason that fraud was submitted in this case. There is a specific reason.

THE COURT: It was pled and I didn't grant summary judgment on it and that's why it was submitted, as far as I'm concerned.

MR. JAMAIL: Okay, okay.

MR. ROEBUCK: That's something collateral that we (91) might take up that's off the record, Your Honor. I don't think it needs to be on the record, at this point.

THE COURT: Okay.

All right. The only thing left, then, is to hear argument and hear from Mr. Jaques if he wants to say something, or still wants to say something. Maybe he's already said what he wants to say in his testimony.

MR. JAQUES: Well, I'm just a little tired right now. So maybe the next time when we come I can say something.

THE COURT: Okay.

All right. Really, Mr. Androphy, I think I've heard your legal arguments here. Do you have other argument that you haven't already made?

MR. ANDROPHY: Your Honor, one of the matters that I would like to address is that when the Court referred to — was talking with Professor Hazard — I have to get used to the podium, Your Honor.

THE COURT: All right.

MR. ANDROPHY: I believe it was Count IV, the Court specifically referenced a federal whether or not, and I may have been mistaken, but the Court specifically referenced the Local Rule Count. But the Local Rule Count was not charged in Count IV. And, I may have been misunderstood, you asked Professor Hazard whether or not —

(92) THE COURT: Oh, all right.

MR. ANDROPHY: — the allegations would have been encompassed within Local Rule 3, and he has not been charged in Count IV with Local Rule 3.

THE COURT: Okay. Thank you.

MR. ANDROPHY: So in the *Schulteg* case, as I informed the Court earlier, it says if it's not included, it meant that it's not basically something that's covered by it. And the fact that they did nothing into that specific local rule meant that the courts and the judges of this jurisdiction spoke against it and just wanted to include

convictions of misdemeanor offenses involving dishonesty or false statements.

With regard to Count I, the arguments again, Your Honor, are on the fact of the interpretation and the review of Local Rule 3 and is whether or not an assault in Michigan is viable under the Local Rules here and, as Professor Hazard stated and I argued earlier, it's not encompassed within Local Rule 3. There's no provision for a reciprocal discipline for a matter that occurs in Michigan that is not a misdemeanor offense or a disbarment, suspension or a conviction.

And for those specific reasons, the Count I against Mr. Jaques, as well as other reasons I've stated earlier, should be dismissed. And, as I repeat, under the *Thalheim* (93) case and the *Ruffalo* case, the Court's bound by its own rules and cannot expand them on an ad hoc basis. And I believe, although it's been stated again and again and again, these provisions are specific as to acts in the court as well as outside the jurisdiction. And none of Mr. Jaques' alleged activity in Michigan fits within the parameters of the Local Rule, plus, as Professor Hazard said, that this Court should defer to the Michigan Bar in this matter.

With regard to Count II, which is the deposition, Mr. Jaques clearly did not discharge his counsel, clearly and unequivocally; he did not appear as counsel; never entered a written appearance, which is specifically provided. As I understand, under the rules one has to sign a document when he is a counsel for a case under the Local Rules, stating specifically that he is aware of the rules. And there's no documentary evidence of that with regard to Mr. Jaques in this specific case.

THE COURT: Okay. I guess my question is, do you have any new arguments other than what we've already covered? Those are the arguments we just went over with Professor Hazard's testimony. Because I'm not going to make a decision on any of this.

MR. ANDROPHY: Same arguments, Your Honor.

THE COURT: Okay.

(94) MR. ANDROPHY: Same arguments that we've been regurgitating on the limitations period, the constitutionality.

THE COURT: I don't anticipate making a decision or issuing any order in this matter until we reconvene with Mr. Peterson and we take up Count I, and Count I will not be taken up until after the criminal trial.

MR. ANDROPHY: Then, I'll defer to that point in time. I was under the impression that Your Honor was going to rule today.

THE COURT: No, I still have your pending motion to dismiss that I need to take a look at; and I would rather rule on the whole thing at one time.

MR. ANDROPHY: That's fair. Thank you.

THE COURT: Okay. All right, if there's nothing further, and I don't know if there is anything further, I'm ready to recess this matter for today. All right.

MR. ROEBUCK: I don't have anything, Your Honor.

THE COURT: Okay. We'll stand in recess. You're excused. Thank you.

(Certificate of Reporter Omitted)